ORIGINAL

IN THE SUPREME COURT OF FLORIDA

No. 71,755

JACOB JOHN DOUGAN,

Appellant,

- v -

STATE OF FLORIDA,

Appellee.

On Appeal from the
Circuit Court for the Fourth Judicial Circuit
In and For Duval County

APPELLANT'S INITIAL BRIEF

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STATEMENT OF THE CASE

A. Introduction

Jacob Dougan is a black man who was sentenced to death on December 4, 1987 following a new sentencing proceeding ordered by this Court. The evidence demonstrates that proceedings resulting in his death sentence were infected with racial bias from beginning to end and that death is a disproportionate sentence for him. He was convicted of the June 17, 1974 murder of a white youth in a racially motivated incident.

Mr. Dougan was born and reared in the Jacksonville, Florida of the 1940's, 50's and 60's where oppression and violence by whites towards blacks was common place, where racial hostility was the order of the day and where Jacksonville, like most American cities, practiced racial apartheid in virtually every aspect of life. Segregation was sanctioned by law, secured by law enforcement and solidified by social behavior.

In spite of the oppressed condition, Jacob Dougan overcame many of the burdens of racism and rose to a position of leadership in his community. He set a shining example for the young people of the community and became a symbol of pride for his peers and his elders.

As the leader of Jacksonville's black community, he established and worked with dozens of programs designed to improve the lives of black people and white people living in the poor, dispirited neighborhoods on the east side of Jacksonville. Before June 17, 1974, he was never involved in any criminal

activity. Indeed, his overriding goal for years was to lead his community out of an era of crime-ridden, exploited, ghettoization and into a new era of strength, social productivity, self-respect and mutual respect within the community at large. Jacob Dougan was loved, even revered, in his community for the good that he did. Despite his conviction and thirteen years of incarceration on death row, the evidence presented at Mr. Dougan's recent sentencing trial revealed that the feeling in the community about him has not changed.

Though fully aware that Jacob Dougan, during a brief period in 1974 had succumbed to an episode of misguided fervor and committed an unacceptable act of violence upon an unsuspecting white youth, a large number of community leaders urged the trial judge to impose a life sentence upon Mr. Dougan. They recognized that his life was committed to improving the lives of black people and throwing off the centuries old yoke of social oppression, notwithstanding the tragic aberration of June 17, 1974.

Ironically, the same racism that Mr. Dougan dedicated his life to fighting found its way into his trial on three salient fronts: (1) In the selection of the jury that resentenced him to death, the prosecution excluded three jurors peremptorily because of their race and further excluded from the jury all but two of fifteen potential black jurors, leaving only elderly blacks to serve; (2) the prosecution appealed to the racial bias of the jury by saturating the jury with racially inflammatory evidence

and emphasizing such evidence during his closing arguments; and (3) The trial judge, R. Hudson Olliff, failed to give proper guidance to the jury in its consideration of mitigating circumstances and failed in his own sentencing deliberations to give the kind of consideration to the mitigating circumstances that the Constitution requires. Finally, Judge Olliff permitted the jury to apply the aggravating circumstances without any material guidance, allowing racial passion and unconstrained discretion to weigh in on the side of death.

B. Course of Prior Proceedings

On March 5, 1975 Mr. Dougan was convicted of first degree murder for the death of Stephen Orlando and was sentenced to death on April 10, 1975. R. 1078.[1] In a joint appeal with his codefendant Elwood Barclay, his conviction and sentence were affirmed. Barclay v. State, 343 So.2d 1266 (Fla. 1977), cert. denied, 439 U.S. 892 (1978). Thereafter, this Court remanded both cases for a hearing pursuant to Gardner v. Florida, 430 U.S. 349 (1977). Barclay v. State, 362 So.2d 657 (Fla. 1978). A sentence of death was reimposed, and this Court again affirmed it on appeal. Dougan v. State, 398 So.2d 439 (Fla.), cert denied, 454 U.S. 882 (1981). On an original habeas corpus petition thereafter, the Court granted Mr. Dougan a new direct appeal on

[1]References to the trial court record will be as follows: "R" will refer to the seven volumes of pleadings and orders, sequentially numbered from pages 1-1199, comprising the transcript of record; "T" will refer to the thirty volumes of transcript, sequentially numbered from pages 1-1951, comprising the transcribed notes of pretrial and trial proceedings.

the basis of appellate counsel's ineffective assistance and conflict of interest in representing both Mr. Dougan and Mr. Barclay in the original appeal. Dougan v. Wainwright, 448 So.2d 1005 (Fla. 1984). In the new appeal, the Court affirmed Mr. Dougan's conviction but vacated his death sentence and remanded for a new sentencing hearing before a new jury. Dougan v. State, 470 So.2d 697 (Fla. 1985).

On September 23, 1987, at the conclusion of the new sentencing trial, the jury recommended 9-3 that Mr. Dougan be sentenced to death. R. 681. On December 4, 1987, the trial court entered its findings of fact and sentenced Mr. Dougan to death. R. 1075-1171.

C. Material Facts

1. The racial climate in which Mr. Dougan was sentenced to death

As we will argue later in the brief, racial bias played a role in Mr. Dougan's resentencing proceeding. For the Court to appreciate this, it must be aware of the material facts concerning race relations and criminal justice in Jacksonville.

Historically, in Jacksonville as in many other cities, black people were segregated and oppressed on account of their race. On the east side of Jacksonville in the 1950's and 1960's, where many black people lived, 70% of the housing was substandard. T. 1234. Residential areas were completely segregated. T. 1236. The schools were segregated, and black schools were provided only with the equipment and textbooks no longer deemed fit for use in

the white schools. T. 1235, 1330, 1355. Black children were bused when necessary to assure complete segregation of the schools. T. 1331. Most public facilities -- buses, restaurants, movies, swimming pools, and parks -- were also completely segregated. T. 1235, 1330-31, 1338. Segregation was enforced by state law, by the police, and by social behavior. T. 1236, 1237, 1357. Black people "had to stay in our place ... had to stay on our streets ... [for] if we ventured off, we would have to fight for our lives to get back." T. 1356.

While the police force was integrated in the 1950's and 1960's, T. 1245, the authority and duties of police officers -- and significantly, tolerance for their misconduct -- was defined along clear racial lines. Black officers could function only in the black community and could exercise authority only over black people. T. 1245. If a white person caused trouble or committed criminal offenses in the black community, black officers could not arrest that person. They were permitted only to call white police officers for help. Id. In contrast, white officers were permitted to exercise authority -- even unlawfully -- over black people. They would "often beat[] or put [black people] in jail just [for] being seen on the street or walking thought the [part of the] community that we were not suppose[d] to be in." T. 1357.

In the 1960's, the civil rights movement and federal civil rights litigation and legislation began to create change. T. 1238-44. Although civil rights activists who engaged in peaceful

demonstrations were sometimes attacked by whites, see T. 1238, and school desegregation was slow, T. 1243, gradually the public vestiges of segregation were dismantled.

Progress was, however, quite uneven. For example in 1968, when Jacksonville and Duval County merged, black people were given assurances of equal participation in the new government and were promised that the new government would improve city services in black residential areas. T. 1240-42. Within a year or two, however, these assurances were seen as hollow. T. 1242. Most of the black members of the community relations commission had resigned because they felt the municipal government was ineffectual in addressing the needs and concerns of the black community. Id.

Race bias also continued to haunt the criminal justice system in this period of time. Police harassment of black people continued to go virtually unchecked. For example, in June, 1971, white police officers shot and killed Donnie Hall, a fifteen-year-old black child. The incident sparked several days of racial turmoil, see R. 107-119, but the police officer responsible for the shooting was never prosecuted. T. 1243; R. 883.[2] Incidents like these led to the filing of a federal civil

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[2]Mr. Dougan and five others were arrested for picketing outside the county courthouse during the grand jury's investigation of this incident. See R. 112. The six were charged with contempt for violating a circuit judge's order to disperse so as not to put "[petit] jurors ... under the pressure of walking through a picket line no matter how laudable the purposes of that line might have been." R. 1008. Mr. Dougan was found guilty of contempt. R. 1009.

rights action by the local NAACP chapter against the police in March, 1974, R. 1060, and to an investigation by the United States Civil Rights Commission, which found that race discrimination permeated the sheriff's department and that a number of white officers engaged in racially-based harassment of black citizens. T. 1244; R. 890-960.

Race bias has periodically continued to punctuate prosecutorial decisions and jury decisions in cases involving racially-motivated homicides. On May 17, 1974, for example, just one month before the murder of Stephen Orlando, James Scarborough, a white youth, was allowed to plead guilty to second degree murder after having been indicted for the first degree murder of a black man named Jerry Penamon. R. 1022-24. According to an interview with Scarborough's defense lawyer, Scarborough and four others were in a car driven by Scarborough when the following incident occurred:

> They saw an old black man who was hitchhiking, and someone said something like: "let's get him; let's get us a nigger." Scarborough said that he would, and he attempted to hit the hitchhiker but missed. The hitchhiker crossed over to the other side of the road, and Scarborough turned the car around, stating something like, "I'll get him this time. I'm gonna kill me a nigger." The hitchhiker was killed on impact.

Appendix B, attached hereto.[3]

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[3]This interview was conducted in the course of data collection for a study reported by Professors Radelet and Pierce. See Radelet and Pierce, Race and Prosecutorial Discretion in Homicide Cases, 19 Law and Soc. Rev. 587 (1985) (finding that in twenty-one Florida counties, including Duval county, race of the defendant and the victim play a statistically significant role in charging decisions). The interview was filed with this Court in

In yet another case, tried within the month after Mr. Dougan's recent sentencing trial, a jury recommended imposition of a life sentence. John D. Freeman, a white man, was convicted of killing one black man and was charged with killing another black man -- where "race hatred" was the alleged motive for both killings. R. 886. On October 30, 1987, notwithstanding the fundamental similarity between the State's theory in Mr. Freeman's case and Mr. Dougan's case, the jury recommended a life sentence for Mr. Freeman. Id.[4]

Thus, while the Jacksonville in September of 1987 was different in some respects from the Jacksonville of the 1950's, 1960's and early 1970's -- in that significant steps had been taken to eliminate racism from the community's public institutions and facilities and neighborhoods -- much was still the same. Racism directed against black people, which produces a devaluation of the lives of black people in relation to white people, was still in place and an operative factor in every day life.

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connection with Elwood Barclay's appeal, reported as Barclay v. State, 470 So.2d 691 (Fla. 1985). See Appendix to Brief of Appellant, No. 64,675, at G 7.

[4]Counsel has subsequently learned that the trial judge overrode the jury's recommendation and imposed a sentence of death in Mr. Freeman's case. As soon as counsel can gain access to the record on appeal in Freeman's case, he will provide supplemental information to the Court. In any event, the jury's recommendation suggests that racial considerations are still operative in the community of Jacksonville.

2. The character and history of Jacob Dougan

Jacob Dougan was born on July 11, 1947 to a white mother and black father. T. 1311. When he was almost seven months old, his mother placed him in an orphanage. T. 1320. She had just remarried her former husband, who was white, and he would not accept Jacob as a part of the family. T. 1314-15. For nearly two years, Jacob lived in the institutional setting of the orphanage, far longer than most other children. T. 1320-21. At the age of 2 1/2, he was placed in the Dougans' home and was eventually adopted by them. T. 1315-16.

Mr. and Mrs. Dougan were black and lived in a racially-segregated neighborhood on the east side of Jacksonville. Mr. Dougan owned and operated a radio and television repair shop during the time that Jacob was growing up. T. 1536. He worked hard and his family prospered because of it. Jacob often worked with him and in the course of it, learned from him

> that the more you had, the more material things you had, the more responsibility you had. And the more responsible you were to your community, to share ... what you had and to help them, to help your environment to be better.

T. 1536. This ethic was practiced day-in and day-out in the Dougan household, and the Dougans were known for their compassion and generosity. T. 1537.

Although the Dougans were relatively better off than most of their neighbors, growing up was nevertheless not an easy process for Jacob. In addition to the burdens imposed by racism, he suffered severely from asthma, T. 1406, and was perceived as

frail and weak, T. 1340, 1394. He was embarrassed by his condition and felt isolated as a result of it. T. 1530-31. In addition, Mrs. Dougan became a chronic alcoholic and eventually died from alcohol-related disease. T. 1538-39. Jacob anguished over his mother's drinking, not knowing that she suffered a serious illness. As he explained, "I always thought that [there] was something I could do to have stopped her from doing it. I mean, I can remember finding her liquor bottles hidden under the pillows, under the mattress, and I would pour them out thinking that, you know, if I pour this bottle out, she will stop." T. 1538-39.

As a result of the vulnerabilities created by his asthma and his small size, T. 1269-70, and the pain associated with his mother's alcoholism, Jacob did not give up, but instead developed a pattern of overcompensating, of trying harder and working harder than most of his peers. As Dr. Harry Krop, a psychologist who testified for the defense explained, "[I]t's tough enough for a kid growing up in adolescen[ce] ... in terms of proving himself but when you have these two strikes against you, you sort of need to submit to that or try and overcompensate. And Jacob extended himself to overcompensate. By that I mean he would try harder than the other kids, he would get involved in [an activity] and he would essentially do better than the other kids. He would practice harder, he would work out more ...." T. 1270.[5]

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[5]Mr. Dougan's need to overcompensate stemmed from yet another source. His mixed parentage shaped his life within months after his birth: his white mother abandoned him because he

For these reasons, Jacob did very well in school and extracurricular activities. He achieved the rank of Eagle Scout and was one of the best scouts ever in his troop. T. 1344-45. He was a very good student, T. 1354, was "studious and highly competitive," T. 1406, was well-disciplined, id., and could always be counted on to carry out his responsibilities, T. 1354. Further, he emerged as a student leader because he was helpful to other students and got along well with everyone. T. 1400, 1406.

During high school as well Jacob began to participate in the civil rights movement. He joined the NAACP youth council and became involved in "activities ... trying to integrate or [de]segregate lunch counters and public facilities there in Jacksonville like sitting in Morrison's, trying to be served and being refused. And marching in peaceful demonstrations." T. 1542. See also T. 1407.

In 1968, following graduation from high school and two years of service in the Air Force, Jacob Dougan returned home eager to resume his civil rights activities and to fulfill his responsibility to make his community a better place to be. T. 1542-43. While working with his father in the radio and

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was half black, T. 1314-15, he spent an unusually long time in an orphanage because neither blacks nor whites would claim him, T. 1322, 1529-30, and, later in life, he was teased and isolated because his skin was too light, T. 1529-30. His early confusion over his racial identity, as well as the difficulties he later suffered, grew not only because he was both black and white, but at least equally because he neither belonged to nor identified with either race. T. 1529-30. As a result, once Jacob Dougan decided he was black, he felt compelled to prove he was truly black. It was then not enough for him simply to be black, he instead had to be more black or better black.

television repair shop, he became involved in the Ionia Street Service Center along with other concerned people in the community. T. 1543. Elected to the board of this center, Jacob helped write a successful grant proposal that led to the construction of the Robert F. Kennedy Center in order to "have a place to house the many programs that w[ere] needed for the community." T. 1543. Over the next six years, sometimes as a board member and sometimes as a paid staff member of the Kennedy Center, Jacob Dougan played a critical role in starting and sustaining an extraordinary number of programs designed to better the lives of the people in his community -- most of which exist to this day -- including:

-- the Youth Congress -- which was designed to encourage black youth to stay in school, to reject the use of drugs and alcohol, and to spend their time constructively, T. 1364, 1508, 1546;

-- the sickle cell anemia screening program, the volunteer professional staff for which was recruited by Mr. Dougan, T. 1365, 1367, 1415, 1441, 1474;

-- a free health clinic, the volunteer staff for which was also recruited by Mr. Dougan, T. 1368, 1413-18;

-- a housing rehabilitation program, which served poor neighborhoods, black and white, T. 1365-66;

-- a legal aid program, T. 1418-19;

-- an organization which resisted the demolition of housing under the Urban Renewal program unless alternative

housing was made available and which eventually began to have a voice in Urban Renewal planning and decisions, T. 1425-26;

-- Meals on Wheels, which in Mr. Dougan's community sought to provide better nutrition for older people in an effort to ameliorate the illnesses caused by poor nutrition, T. 1431-32, 1475, 1545;

-- Walnut House, which helped ex-offenders find employment and housing, T. 1440, 1475;

-- a welfare rights organization, T. 1507; and

-- a karate program for youth, started in the highest crime area on Jacksonville's east side, T. 1553-54, which was designed to teach self-confidence, good health, abstinence from drugs, and commitment to education and growth, T. 1476, 1496, 1509.

During this period of time, which lasted until his arrest in September of 1974, Mr. Dougan occasionally worked with his father, but was employed primarily as a community organizer and youth counselor for various organizations. He worked at St. John's House, a halfway house for delinquent youth, where he was greatly respected for his work with the black and white children who resided there. T. 1518, 1547-49. He worked as a staff member at the Kennedy Center, where his skills as a community organizer helped dissolve the fears of white people living in the Center's service area and opened up the Center's programs to them. T. 1477. And he worked as the director of the "street academy," an educational program focused on street kids and

school dropouts, for the Afro-American Cultural Center. T. 1554-55.

Jacob Dougan did all of these things through his extraordinary strength of character, which was manifested in numerous ways:

* * He treated other people with respect and with dignity. He was never an aggressor or a bully. T. 1379, 1381, 1393, 1401.

* * He was empathetic and deeply sensitive to the suffering around him. T. 1273, 1367, 1408. Because of this quality, he was particularly good at articulating the needs of poor and uneducated people. T. 1420-21; 1435-36.

* * He was gifted at counseling and providing personal positive support for many people, particularly younger people. T. 1272, 1334, 1380, 1386-87, 1406, 1461.

* * He was deeply committed to bettering the lives of black and poor people. As a fellow civil rights activist described him,

> [H]e was in this, he was in that, he was in the other kind of thing because tireless energy kind of a situation, you know, there was a lot of things he could have been in in the community because right down the street from there was ... the beer joints and pool rooms and so forth that he didn't ... ever hang out to. He was down where there was a cause at and wherever there was a concern.

T. 1436. Moses Freeman, who was employed by the Greater Jacksonville Economic Opportunity agency and who evaluated many of the programs in which Mr. Dougan was involved, described his as a "young man with a mission." T. 1366. See also T. 1520.

* * He was an effective and inspiring leader, whom people

liked and trusted. For example, when fellow activist Moses Davis was asked whether Mr. Dougan was "instrumental" in addressing some of the problems in the community in the late '60's and early '70's, he responded,

> Well, he was, I would say, a little more than instrumental because he wasn't an ordinary person. You know, he wasn't, you know, like a gofer type, he was a guy that was leadership and discussions, he was a guy that was leadership in going out touching people. He could come in, you know, like we would say everybody bring somebody tomorrow to the meeting. He would come in with probably more people than anybody else could come in with.

T. 1434.

Despite his profound strengths, Jacob Dougan also suffered a vulnerability which was intimately related to his strengths. Growing up in the Dougan family, Jacob learned early and well that he bore responsibility for improving the lives of his neighbors and his community. He also learned -- in the face of his own shaky beginnings, the chronic problems associated with his asthma, and the terrible self-destruction of his mother's alcoholism -- to be a "survivor." The combination of these factors made Jacob vulnerable to assuming and feeling too much responsibility for the welfare of others. As Dr. Krop explained,

> [I]n one sense Jacob viewed himself ... as a survivor. He survived an alcoholic mother, he survived his asthma, and he survived his institutionalization [in the orphanage]. But he felt other people could not survive and did not have that same type of inner strength that he demonstrated....
>
> The individuals that make it through that type of environment [of family alcoholism] without being an alcoholic are considered survivors, they are individuals who have even a higher sense of responsibility. Sometimes that works against them

> because he takes on responsibilities for other people and that sometimes is inappropriate.

T. 1274-75; 1277-78.

If there were a flaw in Jacob Dougan's character which made him susceptible to the kind of misguided behavior that took place on June 17, 1974, this was it. There plainly were none of the other flaws commonly associated with other persons sentenced to death in this State. T. 1260-61. According to Dr. Krop, many death-sentenced persons "show definite sociopathic tendencies." T. 1260. They are people who from the time they are "young m[e]n or earlier present[] antisocial behavior." Id. Such behavior

> can be aggressive or violent or it could be in the nature of drug abuse or alcohol abuse, but an individual typically getting into trouble and doesn't learn or profit from experiences or the consequences of his actions ....

Id. In sharp contrast to many other condemned persons, Dr. Krop found that "Mr. Dougan, both in terms of lack of suspension from school, and lack of getting into trouble ... as a young boy, basically does not show these types of tendencies." T. 1261.

More importantly, in the intervening years, during his confinement on death row, Mr. Dougan has continued to grow. He has faced up to the mistakes he has made, has not succumbed to bitterness, and has continued to make positive contributions to the world in which he lives. In short, Mr. Dougan "has an excellent potential for rehabilitation." T. 1277. Dr. Krop explained the many reasons for his confidence in reaching this conclusion:

> [Mr. Dougan] is intelligent, he is not bitter about

> [what] happened, he is a good teacher, he works with younger people both before he was arrested and also in jail, he's viewed in the letters that I read constantly referred to him as a compassionate individual, a person who cares about others....
>
> [H]e has tremendous family support, tremendous community support. He's learned a lot on his own....
>
> [A]nother characteristic for his rehabilitation potential is his unselfishness, he is constantly concerned with other people and community above self....
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> Mr. Dougan certainly appears to have used the time constructively and still has some goals for himself in the future.... [H]e recognizes that some significant mistakes were made over ten years ago and he very much is ready to prove that he can contribute first to a prison population in an appropriate way, and then hopefully some day to society if he would ever get that chance.

T. 1277-78; 1289.

3. The circumstances of the offense

To prove the circumstances of the offense, the State relied primarily upon the testimony of one of Mr. Dougan's codefendants, William Hearn, who before the original trial in 1975 pled guilty to second degree murder in exchange for a sentence of fifteen years. T. 944-45, 948. Mr. Hearn served only four years of this sentence before he was released on early parole on the recommendation of the prosecutor. T. 948. His period of parole was then reduced as well, for he was released from parole in 1985. Id. In establishing the events which occurred after the murder, the State relied not only on Hearn but also on three other persons involved in those events: Otis Bess, Edred Black, and James Mattison. Their account is what follows.

In the evening of June 16, 1974, Jacob Dougan, Elwood Barclay, William Hearn, Dwyne Crittenden, and Brad Evans gathered at Elwood Barclay's house. T. 906-909. William Hearn brought his .22 caliber automatic pistol with him to this gathering. T. 908. Brad Evans had a knife. T. 908-909. At Dougan's request, Hearn gave Dougan the .22 pistol and he kept it. T. 910. Thereafter, all five men got into Hearn's car and drove off. T. 909.

As the men were riding in Hearn's car, Hearn saw Dougan writing a note, which he then showed to Hearn and the others. T. 911. The note read as follows:

> [W]arning to the oppressive state. No longer will your atrocities and brutalizing of black people be unpunished. The black man is no longer asleep. We must destroy our enemy, therefore you must die. The revolution has begun. And the oppressed will be victorious. The revolution will end when we are free.

T. 911-12. On the other side of the note were the words, "Black Revolutionary Army, all power to the black people." T. 911. After some discussion, Dougan "said he was going to go out and kill [a] white devil." T. 916. Hearn understood this to mean that Dougan was going to kill somebody. Id.

In the Jacksonville Beach area, the men in Hearn's car saw a young white hitchhiker, and Barclay said, "[H]ere's our chance, pick him up ...." T. 934. The young man was then offered, and accepted, a ride. T. 919. The young man, whose name was Stephen, T. 921, started talking about "reefer" and said he wanted a ride to a place where he could get some. T. 920. When the car got to the street where Stephen wanted to go, Dougan told

Hearn to keep going. Id. Dougan then directed Hearn to a dirt road, and all the while, Stephen was a part of a general conversation about where the best place was to purchase drugs. T. 936-37, 38-39. After Hearn had driven down the dirt road, Dougan direct him to stop, and then Dougan, Barclay, Crittenden, Evans, and Stephen got out. T. 921. When they were out of the car, Dougan said, "[T]his is it, sucker," and Stephen tried to run, but Dougan hit him. T. 922. Stephen was thrown to the ground only two or three feet from the car, and Barclay began stabbing him and stabbed him "a few times." T. 923. Stephen said he would give them a bag of reefer, and then Dougan shot him twice. T. 924. Brad Evans tried to pin the note (that Dougan had written earlier) on Stephen's body with the knife, but he had trouble, so Barclay did it. T. 925.

Within two days after this incident, Hearn and several others saw Dougan at a karate class and later that evening they gathered at James Mattison's house. Dougan had a tape recorder, some tapes, and a note pad. T. 1033, 1092, 1169. Dougan told everyone what they had done, T. 929, and explained that they were going to make tapes about it in order to inform black people "about the political execution of one of the enemies of the black state and tell the people exactly why he was executed ...." T. 1092-93. He then provided notes for people to use in making the tapes. T. 1033-34, 1188. Five tapes were made to be sent to the

press, T. 930-31,[6] with Dougan and Barclay doing most of the recording. T. 1072-73.

Two tapes and a portion of a third tape were made by Mr. Dougan. T. 1172-85. The content of these tapes was repetitive, announcing that

> Stephen A. Orlando was not murdered, he was executed and made to pay for the political crimes that have been perpetrated upon black people. No longer will your crimes go unpunished. A revolution has begun and you are the enemy.

T. 1173. The tapes went on to describe more details about the murder of Mr. Orlando, to explain that more people would be killed, that the killings of whites would be without mercy because of "four hundred years of hangings, castrations, brutalities, and raping of my Black people," and that the war would continue until black people were free. T. 1173-77.[7] The

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[6]According to Edred Black, the tapes were mailed to the media, to the police, and to Ms. Mallory, Stephen Orlando's mother. T. 1073. There was no evidence presented, however, to establish that Ms. Mallory received a tape. See T. 994-95.

[7]The tapes misrepresented the facts about the murder of Stephen Orlando in one respect. They represented that Mr. Orlando was killed as he begged for mercy. T. 1174, 1176. Mr. Hearn -- the only witness to the homicide who was a witness at trial -- testified that Elwood Barclay made this part up, T. 940, and that Mr. Orlando did not beg for mercy. Id.

Another misrepresentation about the circumstances of the homicide was apparently created as well by Barclay. During the gathering at James Mattison's house when the tapes were made, Barclay said that Dougan had put his foot on Orlando's throat to keep him from screaming just before he shot him. T. 1031. On cross-examination, Otis Bess, the witness who first testified to this unequivocally attributed this statement to Barclay. T. 1052. A second witness, Edred Black, attributed this statement to Dougan. T. 1093. In any event, given Mr. Hearn's testimony about the circumstances of the killing -- which recounted nothing about Dougan putting his foot on Orlando's neck -- and given his

full transcription of the taped statements attributed to Mr. Dougan are set forth as Appendix A to the brief.

When asked about his motivation for participating in this incident, Mr. Hearn admitted that at the time "[he] believed that [he] had to force white people to give black people equality ...." T. 942. He himself felt that he had been oppressed because of his race, in "[e]mployment, education, [and] preparation," T. 944, and this was why he went along with what happened.

In context, the homicide for which Jacob Dougan was convicted and sentenced to die resulted from a complex of racial factors which includes historical, racial oppression and bias in Jacksonville, Mr. Dougan's own background, the efforts and commitment of Mr. Dougan to improve the lot of black people in his community, and racial influences in the resentencing proceedings.

SUMMARY OF ARGUMENT

1. The State Attorney used his peremptory challenges to exclude three prospective black jurors solely on account of their race, as shown by the pretextual, inconsistent, and unsupported reasons given for their exclusion.

2. To secure the death sentence for Mr. Dougan, the State Attorney appealed to the race bias of the jury by orchestrating

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unequivocal testimony that "Elwood Barclay made up the part about Stephen Orlando begging for mercy," T. 940, the State failed to establish that Dougan put his foot on Orlando's neck before he shot him.

the exclusion of all the prospective black jurors under the age of 65, by utilizing racially-sensitive evidence in a deliberately inflammatory manner, and by urging as legitimate the consideration of racial fear and racial stereotypes in the sentencing process.

3. By inadequacy of instruction and pretrial orders, the judge precluded the jury's consideration of Mr. Dougan's positive character traits and led the jury to believe that it could not recommend a life sentence if it found that the mitigating circumstances failed to outweigh the aggravating circumstances, in violation of Franklin v. Lynaugh, 101 L.Ed.2d 155 (1986); Skipper v. South Carolina, 476 U.S. 1 (1986); and Lockett v. Ohio, 438 U.S. 586 (1978).

4. By providing no limiting rules of application for the "especially heinous, atrocious or cruel" aggravating circumstance and for the "without pretense of moral or legal justification" portion of the "cold, caluculated" aggravating circumstance, and by failing to define "kidnapping" in the felony murder aggravating circumstance, the trial judge permitted the jury to exercise "the kind of open-ended [sentencing] discretion which was held invalid in Furman. . . ." Maynard v. Cartwright, 100 L.Ed. 2d 372, 380 (1988).

5. Because of the trial judge's failure to understand the fundamental distinction between a murder motivated by racial hatred and a murder motivated by the hatred created by years of victimization and racial oppression, he failed to consider as

mitigating the powerful mitigating evidence in Mr. Dougan's favor, and he found the existence of aggravating circumstances unsupported by the evidence which could properly support them.

6. With additional, substantial mitigating evidence in the record, with the shadows of racial bias removed and with the aggravating circumstances put into the proper, individualized perspective, Enmund v. Florida, 458 U.S. 782, 798 (1982), the Court can readily determine that death is a disproportionate sentence for Jacob Dougan, for his is not "the sort of 'unmitigated' case contemplated by this Court in Dixon [as the kind of case for which the death penalty is reserved]." Fitzpatrick v. State, 527 So.2d 809, 812 (Fla. 1988).

7. The day before Mr. Dougan's sentencing trial began, the main Jacksonville newspaper ran a long feature story about his case, highlighting his prior sentence of death and inadmissible or inaccurate evidence. The community was so saturated with this enormously prejudicial publicity that prejudice to Mr. Dougan's right to a fair trial should have been presumed. Rideau v. Louisiana, 373 U.S. 723 (1963).

8. The use of the "cold, calculated" aggravating circumstance in Mr. Dougan's resentencing proceeding was a retrospective application which disadvantaged Mr. Dougan and as such, violated the Ex Post Facto Clause. See Stanno v. Dugger, __ F.Supp. __, No. 88-425-Civ-ORL-19 (M.D. Fla., May 18, 1988).

9. Unnecessary references in Mr. Dougan's resentencing trial to his "trial in 1975" had the effect of diminishing the

jurors' sense of responsibility for their sentencing recommendation, in violation of the Eighth Amendment rule of Caldwell v. Mississippi, 472 U.S. 320 (1985).

10. A significant portion of the evidence against Mr. Dougan should have been suppressed as the fruits of unconstitutionally-obtained fingerprints (of Mr. Dougan) and of a warrantless arrest in his home under non-exigent circumstances. Davis v. Mississippi, 394 U.S. 721 (1969); Payton v. New York, 445 U.S. 573 (1980).

11. Mr. Dougan's rights, as articulated in Adams v. Dugger, 804 F.2d 1526 (11th Cir. 1986), modified, 816 F.2d 1493 (11th Cir. 1987), cert. granted, __U.S.__, No. 87-121 (March 7, 1988), were violated, by the absence of any instruction informing the jury that considerable deference would be given to its recommended sentence.

12. The prosecutor agreed in advance of trial that life was an appropriate sentence for Mr. Dougan, but then allowed the family of the victim to veto his decision, violating his duties under state law and creating a risk of discriminatory, arbitrary imposition of the death penalty.

ARGUMENT

I. THE STATE ATTORNEY DENIED MR. DOUGAN EQUAL PROTECTION BY PEREMPTORILY EXCUSING PROSPECTIVE BLACK JURORS ON ACCOUNT OF THEIR RACE

The state attorney in Mr. Dougan's sentencing proceeding

peremptorily excused four black prospective jurors: Mr. Covan, T. 467-68; Ms. Henley, T. 469; Ms. Lester, T. 469-70; and Ms. Sloan, T. 600. Defense counsel objected to these exclusions under Batson v. Kentucky, 476 U.S. 79 (1986), and State v. Neil, 457 So.2d 481 (Fla. 1984), clarified sub nom., State v. Castillo, 486 So.2d 565 (1986). T. 470; 600, 603. Judge Olliff was "satisfied that [Mr. Dougan's] objection was proper and not frivolous," State v. Slappy, 522 So.2d 18, 22 (Fla. 1988), and thus the burden of proof shifted to the State to show that the exclusions were not based on the race of the jurors. Id. The question presented by Mr. Dougan is whether the State met its burden to show a "'clear and reasonably specific' racially neutral explanation of 'legitimate reasons' for [its] use of its peremptory challenges." Id. (quoting Batson, 476 U.S. at 96-98 n.20). Under the criteria identified in Slappy, the State failed to meet this burden.

To meet its burden under Batson and Neil, the State must show first that the proffered reasons for exclusion are "neutral and reasonable," Slappy, 522 So.2d at 22, and second that there is "record support for the reasons given and the absence of pretext." Id. at 23. To satisfy the "neutral and reasonable" requirement, the State must present racially neutral reasons that at least "some reasonable persons would agree" provide a reasonable basis for exclusion. Id. To satisfy its duty to show "record support for the reasons given and the absence of pretext," the State must pass a more complex test. If any of the

following factors -- or similar factors -- is present, the State will fail:

> (1) alleged group bias not shown to be shared by the juror in question, (2) failure to examine the juror or perfunctory examination, assuming neither the trial court nor opposing counsel had questioned the juror, (3) singling the juror out for special questioning designed to evoke a certain response, (4) the prosecutor's reason is unrelated to the facts of the case, and (5) a challenge based on reasons equally applicable to juror[s] who were not challenged.

Slappy, 522 So.2d at 22.

When these criteria are applied to the exclusions of the black jurors in Mr. Dougan's case, the State's reasons for excluding three of the four jurors fail to establish that the exclusions were racially neutral. The exclusion of Mr. Covan provides the most straightforward example. The only reason given for the exclusion of Mr. Covan was his equivocation on whether he could consider imposing a death sentence, which led the prosecutor to conclude that Mr. Covan's ultimate assertion that he could consider a death sentence was incredible. As the prosecutor explained,

> [O]n Mr. Covan, he indicated unequivocally yesterday, Judge, there were no circumstances in which he could recommend the death penalty. And then he indicates to the Court that he's thought about it and now feels may be some circumstances. It indicates to the State, Judge, regardless of his last remark -- regardless of his race, race is not involved at all. That that's just the incredible position and that we should be in to give our peremptories with respect to Mr. Covan because of his hesitancy against the death penalty and his statements yesterday he never could vote for the death penalty. Notwithstanding his comments to the contrary today.

T. 470-71. While this appeared to be a racially neutral and

reasonable basis for excluding Mr. Covan, it was mere pretext, because the prosecutor failed to challenge another juror[8] -- who ultimately sat on the jury -- on this basis. The other juror presented at least as strong a case for exclusion on the very same basis as did Mr. Covan.

Mr. Covan did give conflicting answers to the prosecutor and defense counsel concerning his ability to consider imposing a death sentence. The colloquy with the prosecutor consisted of the following:

> MR. KUNZ: Okay. Under any circumstance could you recommend that a person be sentenced to death?
>
> THE VENIREMAN: No.
>
> MR. KUNZ: Thank you, Ms. Jones. Ms. Taylor?
>
> THE VENIREMAN: Yes, I could.
>
> MR. KUNZ: Mr. Covan?
>
> THE VENIREMAN: No.
>
> MR. KUNZ: Okay. Under any circumstance there is no circumstance you could think of that you would recommend that a person be sentenced to death?
>
> THE VENIREMAN: Well, no.

T. 264. In the ensuing examination by defense counsel, Mr. Covan provided a different answer:

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[8]The records do not reflect the race of this juror. But whether this juror is black or white is not determinative of the prosecutor's bias. Whatever the race of the juror, the prosecutor's bias is manifest. The reason he gave could not have been the reason for excluding Mr. Covan because he accepted a juror to whom the same reasons fully applied. Other characteristics of the non-excluded do not matter at all because the prosecutor gave only the one reason for excluding Ms. Covan.

> [MR. LINK]: Do you feel you would be able to, in an appropriate case, a case -- can you conceive of a case where you would recommend the death penalty or could recommend the death penalty based upon your duty as a juror and the fact that you are called in to service?
>
> PROSPECTIVE JUROR: Depending on the circumstances.
>
> MR. LINK: Okay. Would depend upon the circumstances of the case?
>
> PROSPECTIVE JUROR: Right.

T. 432 (examination beginning at T. 431).[9]

But the juror whom the State did not challenge, Ms. Gilbert, gave similarly conflicting responses. Initially, she stated without hesitation that she could consider imposing a death sentence:

> MR. KUNZ: Ms. Gilbert, my question is in the appropriate case if you found the aggravating circumstances outweighed the mitigating circumstances you could recommend that person be sentenced to death?
>
> THE VENIREMAN: Yes.

T. 267. Thereafter, in the course of a colloquy concerning Ms. Gilbert's acquaintance with pretrial publicity and her conversation with her husband about it, during which her husband said that the sentence ought to be life imprisonment, Ms. Gilbert took a contradictory position:

9One could reasonably read these two responses as consistent, because Mr. Covan's response to the prosecutor, "Well, no," may have indicated a hesitation that was later revealed by defense counsel. Even if the responses are read as contradictory, however, the prosecutor's exclusion of Mr. Covan was racially based.

> MR. KUNZ: Assuming you listened to the evidence here, do you think you could, if you found that death would be the appropriate sentence, do you think you could recommend that to the Judge? Notwithstanding your husband's opinion that he thought life would be appropriate?
>
> PROSPECTIVE JUROR: I don't believe in death. I believe in just life time.
>
> MR. KUNZ: You don't think you could recommend a death sentence?
>
> PROSPECTIVE JUROR: No, sir.
>
> MR. KUNZ: In this case?
>
> PROSPECTIVE JUROR: No, sir.
>
> MR. KUNZ: Under any circumstances?
>
> PROSPECTIVE JUROR: No, sir.

T. 408-409. In examination thereafter by defense counsel, Ms. Gilbert changed her position yet again:

> MR. LINK: Miss Gilbert ... I believe you had indicated at one point that you could recommend a death sentence depending upon the circumstances, is that right?
>
> PROSPECTIVE JUROR: Yes, Sir.

T. 434.

At a later point in the voir dire, when cause challenges were being considered, further examination of Mr. Covan and Ms. Gilbert was undertaken. T. 446-51. The reason was that they had both given contradictory answers to the questions concerning their ability to consider the death penalty. T. 442-44. Indeed, the prosecutor noted that Mr. Covan and Ms. Gilbert were "the same" in this respect. T. 443. In the colloquy that followed between Judge Olliff and Mr. Covan, Mr. Covan explained his

contradictory responses as follows:

> PROSPECTIVE JUROR: Yeah, okay. When I left here yesterday and I thought about it, and I got to the point where I think depending on that circumstance what caused him to commit the crime, that would, you know, lead to my opinion what kind of sentence he should have.

T. 446. In a follow-up question by Judge Olliff, he then affirmed unequivocally that his vote "could be death depending on the circumstances." T. 447. Neither the prosecutor not the defense counsel asked any further questions of Mr. Covan. T. 446-47.

In contrast, the colloquy with Ms. Gilbert was much more extensive. See T. 447-51 (copy included herewith as Appendix C). When confronted with her contradictory answers, Ms. Gilbert initially said that she "misunderstood" the questions about considering death as a penalty. T. 447-49. She then tried to explain, "I don't like those death sentences." T. 450. Judge Olliff then explained that she could still sit on the jury so long as she were able to vote for death if the aggravating circumstances outweigh the mitigating circumstances. T. 450. In response to this, Ms. Gilbert said she could vote for death "[i]f the circumstances justify it." T. 450-51.

The comparison of Mr. Covan and Ms. Gilbert thus reveals no articulable difference in their responses. They were both equivocal, or contradictory, in stating whether they could consider the death penalty, and they both resolved their equivocation by stating clearly that they could "depending on the circumstances" recommend death. There was no reason articulated

by the prosecutor to show why he accepted Mrs. Gilbert but rejected Mr. Covan. It appears that the real reason is that the prosecutor wanted to limit the number of blacks on the jury.[10]

The prosecutor's exclusion of Ms. Lester was based upon two reasons, one of which was the same as his reason for excluding Mr. Covan:

> As to Miss Lester, we are moving -- even though her statements with the death penalty did not rise to the level of cause, they were sufficient for us, Judge, to concern ourselves with her being probative. She indicated she was definitely against the death penalty, she did indicate she could follow the Court's instructions. The State is a little concerned with respect to her responses in that area, Judge, with respect to her responses to the State.
>
> Additionally, Judge, she stated she'd had a husband who has been in trouble before which concerns us with respect to her feelings towards criminal justice system. Even though she's indicated she does not have a problem with that fact, we think those are valid neutral reasons, Judge, that we could move for peremptory challenges on Miss Lester. And that is why we have done so.

T. 472-73.

The first reason is readily disposed of as pretextual in light of the prosecutor's failure to challenge Ms. Gilbert on this basis. As the colloquies with Ms. Lester clearly show, she was indistinguishable from Ms. Gilbert.[11] Like Ms. Gilbert, Ms. Lester did not believe in the death penalty. T. 440. Despite

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[10]Even if the prosecutor or his representative could comb through the record now and articulate reasons for the exclusion, such reasons would be unavailing because they would not reflect what was in the prosecutor's mind at the time he announced his reasons.

[11]The colloquies concerning Ms. Lester's ability to consider imposing a death sentence are set forth in Appendix D.

this belief, however, Ms. Lester was willing to follow the law and to recommend death in an appropriate case. T. 268-69, 440. In this respect, she was indistinguishable from Ms. Gilbert. See Appendix C.

The second reason provided by the prosecutor -- a possible bias against the criminal justice system's imposition of punishment -- could well be a proper non-racial reason for exclusion, but it could not have been here, for the facts did not establish it. The prosecutor assumed that Ms. Lester might be biased against the criminal justice system because he believed that her husband had been prosecuted, convicted, and punished by it. None of these assumptions was based in fact. In the colloquy with Ms. Lester in which she revealed that her husband had been "in trouble," defense counsel was asking prospective jurors whether anyone they knew had ever been a victim of crime. T. 336. To appreciate Ms. Lester's response, the questions of other jurors which preceded the questions to her, as well as the questions to her, must be examined:

> [MR. LINK:] Mrs. Abraham, anyone close to you ever been the victim of a crime?
>
> PROSPECTIVE JUROR: No.
>
> MR. LINK: Mrs. Seals?
>
> PROSPECTIVE JUROR: Yes, myself.
>
> MR. LINK: Okay. Was it a -- what sort of offense? Without telling us a lot of details.
>
> PROSPECTIVE JUROR: Someone tried to grab my purse on the street, and when they couldn't get it, they beat me, kicked me many times.

MR. LINK: Was that individual a black person or white person?

PROSPECTIVE JUROR: It was a white person, and black man who came to my aid.

MR. LINK: Was anyone ever arrested and charged with that offense?

PROSPECTIVE JUROR: No, sir.

MR. LINK: Do you think that experience would have -- would make it difficult for you to give Mr. Dougan a fair trial knowing he's been found guilty of first degree murder?

PROSPECTIVE JUROR: I don't believe it would.

MR. LINK: Okay, thank you. Mrs. Williams?

PROSPECTIVE JUROR: No.

MR. LINK: And Mrs. Lester?

PROSPECTIVE JUROR: Well, not homicide, but my husband has been in trouble.

MR. LINK: Okay. Has anyone ever close to you been the victim of a crime of violence, such as: A robbery or a beating or something like that?

PROSPECTIVE JUROR: No.

T. 336-37.

In this context, Ms. Lester's reference to the fact that "my husband has been in trouble" raises more questions than it answers: Does she mean that his trouble was related to being a victim or a perpetrator of a crime? If a perpetrator, was her husband ever charged, tried, convicted, or punished? Did she feel that the system worked fairly in the disposition of his "trouble"? Has this experience created any bad feeling toward

the criminal justice system? For the prosecutor to reach a rational conclusion that Ms. Lester might be biased against the criminal justice system because of her "husband ha[ving] been in trouble," all of these questions would need to be answered. Yet, they were not even asked. Accordingly, this reason is also pretextual, on the basis of two of the five factors cited in Slappy:

> (1) alleged group bias not shown to be shared by the juror in question, (2) failure to examine the juror or perfunctory examination, assuming neither the trial court nor opposing counsel had questioned the juror [as to the relevant facts]....

522 So.2d at 22. As in Slappy itself, if Ms. Lester did harbor a bias against the criminal justice system, "the state could have established it by a few questions...," id. at 23. Its failure to do so unmasks its second reason for excluding her as a pretext for race discrimination.

The third and final juror whom the prosecutor discriminatorily excluded was Ms. Sloan. The prosecutor provided three reasons for excluding Ms. Sloan, two of which were similar to the reasons for excluding Mr. Covan and Ms. Lester:

> MR. KUNZ: Judge, [Ms. Sloan] -- in response to me with respect to death penalty questions, she could not under any circumstances vote for -- she did change when Mr. Link asked her, but I point out that he used a term could she consider the death penalty which is different than recommending. And I do knowledge that when the Court talked to her she said, well, that's the law. That still doesn't instill a lot of faith in me, Judge, that she's really going to consider it. That's one factor, Judge.
>
> The second factor she had a brother who was

> in the criminal justice system, and she had to testify in his trial. And I think that would be an adverse for the State, even though she indicated it wouldn't affect her, we think that's not the type of person we want.
>
> Third thing, Judge, she's got some experience working for H.R.S. and that's a general enough type of individual in terms of the complaint the State would not like to see sit on the jury. So for those three reasons, Judge, that's why we move to strike Miss Sloan.

T. 600-601

The first reason is readily disposed of as pretextual in light of the prosecution's failure to challenge Ms. Gilbert on this basis. Like Ms. Gilbert and Ms. Lester, Ms. Sloan was also personally opposed to the death penalty, and this belief initially led her to say that she could not consider it in Mr. Dougan's case. T.508-09, 579-80.[12] Once she understood the duty to set aside these beliefs and follow the law, she unequivocally stated to defense counsel and again to Judge Olliff that if the circumstances warranted death in this case, she could recommend (not just "consider") it. T. 579-80; 591-92. With respect to the prosecutor's first reason, therefore, she too was indistinguishable from Ms. Gilbert. See Appendix C.

The second reason for excluding her is, like the second reason proffered for excluding Ms. Lester, a reason that can be valid under Batson: an anti-prosecution bias due to the previous prosecution of a close friend or relative. With respect to Ms.

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[12]The colloquies with Ms. Sloan concerning this question are collected and fully set forth as Appendix E to the brief.

Sloan, however, this reason is not legitimate, in part, for the same reason it was not legitimate for Ms. Lester: it was not supported by the record. See State v. Slappy, 522 S.2d at 22 ("alleged group bias not shown to be shared by the juror in question"). See also Tillman v. State, 522 So.2d 14, 17 (Fla. 1988) ("the record does not support the reason").

The facts giving rise to the prosecutor's second "concern" about Ms. Sloan were revealed as follows:

> MR. KUNZ: Anybody else ever been a witness in court, whether it be criminal or civil case? Yes, ma'am, Miss Sloan?
>
> PROSPECTIVE JUROR: I was a witness at my brother's trial.
>
> MR. KUNZ: Was anything about that experience, Miss Sloan, that you think would affect you?
>
> PROSPECTIVE JUROR: No.
>
> MR. KUNZ: Was there anything about the way your brother's case was handled in the criminal justice system that leaves you with any bitter feelings towards the State of Florida?
>
> PROSPECTIVE JUROR: No.
>
> MR. KUNZ: Did that occur in the State of Florida, ma'am?
>
> PROSPECTIVE JUROR: Yes.

T. 494-95. While the group of people whose relatives have been prosecuted might share the trait which allegedly worried the prosecutor here, that "alleged group bias [was] not shown to be shared by [Ms. Sloan]." State v. Slappy, 522 So.2d at 22. To say that she was excluded for this reason, therefore, is to present a pretext for discrimination.

The reality of the pretext is underscored by the prosecutor's superficial inquiry on this subject. The prosecutor made no effort to determine, for example, whether Ms. Sloan's brother was even prosecuted in a criminal (as opposed to civil) trial, whether and for what crime he was convicted, for what purpose she testified, and how in relation to these facts she felt about the prosecution and ultimate resolution of the case. Upon this kind of inquiry, the prosecutor may have learned any number of facts that would have provided a basis for determining whether the juror was biased from her experience with the criminal justice system. Without such an inquiry, there is too much risk that the "prosecutor's own conscious or unconscious racism" led him to the conclusion that Ms. Sloan was unacceptable. See Batson v. Kentucky, 476 U.S. at 106 (Marshall, J., concurring). The State thus failed altogether to do what this Court said it must in Slappy: "to support its explanations with neutral reasons based on answers provided at voir dire or otherwise disclosed on the record itself." 522 So.2d at 23.

The final reason for excluding Ms. Sloan was just as pretextual: Ms. Sloan worked for Health and Rehabilitative Services. T. 601. The facts are that Ms. Sloan worked as a secretary for HRS for "[a]pproximately one year," T. 499, in an area that had nothing to do with "the court system or anything like that with respect to juveniles or anything like that." Id. It is not at all clear that a reasonable person would agree that such work experience bears any relation to the facts of the case.

See State v. Slappy, 522 So.2d at 22 ("the prosecutor's reason is unrelated to the facts of the case"). Even if one could reasonably infer that someone who worked for HRS was, like the elementary school assistant in Slappy, "liberal," 522 So.2d at 23, the prosecutor here, like the prosecutor in Slappy, made no effort to establish this fact. Without such facts, this reason is, as the others are, no more than a pretext for race discrimination.

The prosecutor's discriminatory exclusion of Mr. Covan, Ms. Lester, and Ms. Sloan is reversible error even though two black persons ultimately sat on Mr. Dougan's jury. T. 642-43. See State v. Slappy, 522 So.2d at 24 (and cases cited therein). This is because

> The striking of a single black juror for a racial reason violates the Equal Protection Clause, even where other black jurors are seated, and even where there are valid reasons for the striking of some black jurors.

United States v. Gordon, 817 F.2d 1538, 1541 (11th Cir. 1987) (cited with approval in Slappy, 522 So.2d at 21).

II. IN VIOLATION OF THE EIGHTH AND FOURTEENTH AMENDMENTS, THE PROSECUTOR IMPERMISSIBLY APPEALED TO RACE BIAS IN URGING THE JURY TO SENTENCE MR. DOUGAN TO DEATH

The prosecutor's strategy in Mr. Dougan's case was designed to make race bias a factor in the jury's sentence recommendation. As we have already demonstrated, he excluded three prospective black jurors because of their race, in stark violation of the Equal Protection Clause. He excluded a fourth black juror

peremptorily on partially race neutral grounds.[13] He also was able to exclude, on the basis of challenges for cause under Witherspoon v. Illinois, 391 U.S. 510 (1968) and Wainwright v. Witt, 469 U.S. 412 (1985), an additional nine prospective black jurors.[14] Altogether, therefore, the prosecutor excluded

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[13]This juror, Daphne Henley, was excluded because of responses to the death-penalty-consideration questions similar to Ms. Gilbert's. Compare T. 261-63; 432 with Appendix C. While this reason was not race neutral, the second reason for her exclusion was: Ms. Henley revealed that she had started working on a master's degree in psychology. T. 370-71. The prosecutor said his exclusion was also based on this, for he did not want someone "this enamored" with psychology evaluating the defense psychologist's testimony in the jury room. T. 472.

[14]There is some tension between the state's right to excuse jurors for cause under Witherspoon-Witt, and the defendant's right to a jury drawn from a fair cross-section of the community and to an impartial jury. While the Supreme Court resolved this tension as to "Witherspoon-excludables" in Lockhart v. McCree, 476 U.S. 162 (1986), it did not decide in Lockhart what the result should be if the exclusion of jurors under Witherspoon-Witt results in trial by a jury from which disproportionate numbers of black jurors have been excluded.

One can argue that such a process violates the cross-section requirement, much like the peremptory exclusion of prospective black jurors arguably does. See Teague v. Lane, No. 87-5259 (now pending in the Supreme Court on the question of whether the Batson-violative exclusion of blacks violates the Sixth Amendment's fair cross-section requirement). One can further argue that such a process violates the right to an impartial jury, for it deprives the defendant of black jurors, whose very presence is a safeguard against the operation of race bias in jury deliberations, and whose absence encourages the operation of race bias. See Strauder v. West Virginia, 100 U.S. 303, 308 (1880) (exclusion of black jurors serves "as a stimulant to that race prejudice which is an impediment to securing to [black] individuals ... that equal justice which the law aims to secure to all others"); Batson v. Kentucky, 476 U.S. at 86 n. 8 ("discriminatory selection procedures make 'juries ready weapons for officials to oppress those accused individuals who by chance are numbered among unpopular or inarticulate minorities'").

This issue is presented by Mr. Dougan's case because nine prospective black jurors were excluded under Witherspoon-Witt.

thirteen prospective black jurors from Mr. Dougan's jury.

This result was no accident. The prosecutor knew as well as anyone else in Jacksonville that race bias and prejudice are still very much a factor in inter-racial relations in Jacksonville. See Statement of the Case, supra. The prosecutor also knew what the Supreme Court has known and articulated for more than a century: that the exclusion of black jurors serves "as a stimulant to that race prejudice which is an impediment to securing to [black] individuals ... that equal justice which the law aims to secure to all others." Strauder v. West Virginia, 100 U.S. 303, 308 (1880). While the prosecutor here did not attempt to exclude all blacks from Mr. Dougan's jury, the two black jurors who did sit were described by one of the excluded black jurors as over "65 years old," "uneducated," and "weak." See R. 1031-32 (affidavit of Daphne Henley).[15] Accordingly, the

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In the clash between the state's right to "death qualify" a jury and the defendant's right to have a fair representation of blacks on his jury, we submit that the right to have blacks on one's jury is predominant. Cf. Lockhart v. McCree, 476 U.S. at 150 (implying that the petitioner could prevail if he could show that death-qualification "tainted [his trial] by any of the kinds of jury bias ... that we have previously recognized as violative of the Constitution"). However, this issue need not be reached if the Court finds any other ground sufficient to warrant a new sentencing proceeding.

[15]The exclusion of all other prospective black jurors prompted the following comment from the president of Jacksonville's chapter of the Southern Christian Leadership Conference, in a presentencing letter to Judge Olliff:

> Unfortunately, the contributions made by Mr. Dougan and others have not been acknowledged by the majority white community as advances which improve the entire community; if they are viewed in a positive light at all, they are seen as advances merely for the black

first part of the prosecutor's strategy for appealing to race bias was accomplished in the jury selection process. He successfully excluded most prospective black jurors, making the jury which heard the case a "ready weapon[] for [him] to oppress those accused individuals who by chance are numbered among unpopular or inarticulate minorities." Akins v. Texas, 325 U.S. 398, 408 (1945) (Murphy, J., dissenting) (quoted in Batson v. Kentucky, 476 U.S. at 86 n. 8).

The second part of the prosecutor's strategy was to utilize the evidence in Mr. Dougan's case which was the most likely to inflame the fires of racial bias in such a way that its inflammatory quality was heavily emphasized. The prosecutor had at his disposal three categories of racially inflammatory evidence: the note left with Stephen Orlando's body,[16] two

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> community. In this regard, we are concerned that all black people of Mr. Dougan's generation were excluded from the jury empaneled for Mr. Dougan's recent sentencing proceeding, thereby barring him from receiving an objective hearing by a true cross-section of the community and by his peers.

R. 1062.

[16]This note was admitted as State's Exhibit 15, and it read:

> [W]arning to the oppressive state. No longer will you atrocities and brutalizing of black people be unpunished. The black man is no longer asleep. We must destroy our enemy, therefore you must die. The revolution has begun. And the oppressed will be victorious. The revolution will end when we are free.

T. 911-12.

handwriting exemplars from Mr. Dougan,[17] and three tapes containing messages recorded by Mr. Dougan after the murder of

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[17]These exemplars were both contained in a legal pad, admitted as State's Exhibit 16. The content of the first exemplar was the following:

> From the city streets
> To the county jail
> Disregarding your rights
> By not giving you bail
>
> The Amerikkkan way
> Is what you have seen
> It's really a nightmare
> And not an Amerikkkan dream
>
> You have just left a place
> Where many brothers have died
> Fighting for our freedom
> With dignity and pride
>
> Sometimes the seclusion
> Helps a man to think
> From the fountain of wisdom
> He takes a deep drink
>
> Let your mind be as free
> As the peace-loving dove
> May your heart be filled
> With an abundance of black love

The content of the second exemplar was as follow:

> The attitudes of Black People must change in order for us to obtain freedom. We can no longer turn our backs on racism in any form. We must attack our so called Black leader to point of functioning. They have become only figure heads in the Black Community. The only time you see them is when a tragedy happens. They have taken on the characteristics of the white man and that is that they only treat the effects of the problem. Leading black people is a 24 hour 365 days a year job and glory seekers are unqualified.

Stephen Orlando.[18] Despite pretrial motions in limine and objections to the admissibility of these items of evidence by defense counsel,[19] Judge Olliff admitted them.

These items of evidence were relevant to issues in the trial,[20] but they were also manifestly inflammatory. The risk that they would evoke feelings of race bias and prejudice was enormous. While these items of evidence could properly evoke moral outrage over the constitutionally legitimate, aggravating aspects of the murder, they also carried a very high potential for evoking race bias and prejudice: "[f]ear of blacks, which could easily be stirred up by the violent facts of petitioner's crime, [and which] might incline a juror to favor the death penalty." Turner v. Murray, 476 U.S. 28, 35 (1986).

In the face of this extraordinary potential for evoking racial concerns, the prosecutor took no steps to guard against its evocation. To the contrary, he did all he could to maximize the jury's exposure to this evidence. He initially introduced the contents of the note through Mr. Hearn's testimony, after Mr. Hearn had identified the note as the one written by Mr.

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[18]The transcribed messages on these tapes have been included with the brief as Appendix A.

[19]These objections have been presented in the brief to this court as well. See Issue ___, infra.

[20]The note left with Mr. Orlando's body and the tapes were arguably relevant to the killer's state of mind at the time of the homicide, and the tapes were arguably relevant to (though unreliable and inaccurate in proving) the suffering of Mr. Orlando at the time he was killed. The handwriting exemplars were relevant to establishing that Mr. Dougan wrote the note left with the body.

Dougan and left with the body. T. 911-12. Despite this evidence, the prosecutor thereafter called a handwriting expert to establish that Mr. Dougan had written the note, by comparing the note to the two exemplars. T. 1189-1211. Cumulative in light of Hearn's testimony, this testimony was rendered utterly unnecessary and immaterial by Mr. Dougan's concession that he had written the note left with the body.[21] Nevertheless, Judge Olliff permitted the prosecutor to present the handwriting expert's testimony.

In illustrating to the jury how he came to the conclusion that Mr. Dougan had written the body note, the expert was allowed to use two huge enlargements of the note and equally large enlargements of the handwriting exemplars. T. 1194-96. For more than an hour,[22] these documents were on display before the jury while the expert painstakingly illustrated a factual conclusion which had already been conclusively established by Mr. Hearn's testimony and Mr. Dougan's concession. In these circumstances, the sole purpose of this testimony was to display these exhibits to the jury for more than an hour with the expectation that the jury's racial animus would be aroused by such extended exposure.

Similarly, the prosecutor exploited the inflammatory

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[21]As counsel for Mr. Dougan explained, in the course of objecting to the handwriting expert's displaying enlarged versions of the body note and handwriting exemplars to the jury, "Judge, we're not contesting who wrote that note." T. 1195.

[22]The court recessed at the end of the expert's testimony, noting that "[w]e have been going for approximately one hour and a half listening to the testimony of the expert." T. 1211.

qualities of the tapes made by Mr. Dougan. Although introduced through several witnesses, the tapes were played during the testimony of James Mattison. See T. 1173-75, 1175-77, 1185. During the prosecutor's closing argument, the longest and most inflammatory of the tapes was played again, over the objection of defense counsel that this was "unduly inflammatory." T. 1168-1700.[23]

The third and last part of the prosecutor's strategy of appealing to race bias was carried out in closing argument. There, the prosecutor appealed to the jury's racial passions and sanctioned reliance on those passions in three ways.

First, he invited the jury to make racial considerations -- the very ones inflamed by the evidence -- a part of its deliberations:

> [R]ace has been made an issue in this case. Mr. Link will no doubt talk about racism when he gets up before you. Race was made an issue in this case by a note left on a body. This note right here. Race was made an issue in this case by tape recordings that that murderer sent out in this community in 1974. The state of Florida did not elect to make race an issue. This defendant made race an issue when he picked up an innocent 18 year old boy and solely because of the color of his skin murdered him.

T. 1662-63.

This open invitation to make racial considerations a legitimate part of the jury's deliberations was fraught with constitutional danger. The Constitution does not preclude a capital sentencing jury from considering the racial motivation of

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[23]This is the same tape transcribed at T. 1173-75, which is included (with these page numbers) in Appendix C.

a murder as an aggravating circumstance. However, it cannot allow the sentencer to become racially-motivated in response to the racial motivation behind the murder, for the Eighth and Fourteenth Amendments manifestly do not allow a racist fear of blacks, race bias, or race prejudice -- "which could easily be stirred up by the violent facts of [a crime like Mr. Dougan's]," Turner v. Murray, 476 U.S. at 35 -- to become a legitimate part of sentencing deliberations. The prosecutor's remarks here were thus quite dangerous. By sanctioning considerations of race without making this fundamental distinction, the prosecutor increased even more the risk that unconstitutional racial considerations would enter into the jury's sentencing recommendation.

Second, the prosecutor argued that the jury should find the "especially heinous, atrocious or cruel" aggravating circumstance in major part because of "[t]he mental anguish that this boy suffered before his death ...." T. 1689. In describing the mental anguish of Stephen Orlando, the prosecutor again invoked race bias. Calling up one of the most fundamental racial stereotypes in the culture of racism -- white people's deep-seated fear of drug-seeking or drug-"crazed", violent black people -- the prosecutor urged the jury to ratify that stereotype by finding that Stephen Orlando experienced this very fear just before he was killed:

> He [Orlando] made a statement, something to the effect let me give you some reefer, that's all he could-- that's all he thought they wanted. Pitiful kid laying on a dirt road being stabbed, four black males over top

> of him begging for mercy, trying to offer something that he thought they wanted.

T. 1690.

In Robinson v. State, 520 So.2d 1 (Fla. 1988), this court faced a very similar attempt by a prosecutor to invoke racist fears. There, the black defendant was charged with raping, kidnapping, and murdering a white woman. That very set of facts, the Court noted, presented "fertile soil for the seeds of racial prejudice." Id. at 7. Due to this, when the prosecutor attempted to show that the defendant had previously raped another white woman, the Court found that the prosecutor was trying "to insinuate that appellant had a habit of preying on white women ...." Id. at 6. Due to the enormous risk that race bias would play a role in Robinson's capital sentencing proceeding anyway, this explicit appeal to racial fears was roundly condemned as "an improper attempt to make a racial appeal." Id. at 6. The very same thing occurred when the prosecutor in Mr. Dougan's case made an explicit appeal to the racial fears which plainly shadowed the facts of his case.

The prosecutor concluded his invocation of race bias when he argued against the finding of mitigating circumstances. The theme of the prosecutor's argument was that the jury should find that there were no mitigating circumstances, because if Mr. Dougan were the kind of compassionate, caring, unselfish person his witnesses made him out to be, he would not have committed this murder. Time and again, he belittled and ridiculed the notion that Mr. Dougan could be the kind of person his witnesses

thought he was, and at the same time murder Stephen Orlando simply because his skin was white. The following three excerpts from the prosecutor's argument illustrate this theme in vivid terms:

> [All] the witnesses that the defendant presented yesterday and today ... they can't explain to you his words on the tape, his violence that he committed to Stephen Anthony Orlando. The tapes are the best reason, ladies and gentlemen, and the statements that the defendant made on these tape recordings, the best reason you need not ... to put any weight to all the arguments that Mr. Link is going to make with possible mitigating circumstances through these witnesses of this great community leader and this great compassionate person. These witnesses weren't talking about this murderer or this incident back in June of 1974.

T. 1701.

> You also heard testimony from a lot of fine men and wom[e]n, black men and wom[e]n who were educators and who did real well and they never saw it fitting to go out and do an awful de[e]d that this defendant did. For you to accept the argument that racism is a mitigating circumstance here or some sort of pretense for justify[ing] this defendant's act is for you to do a disservice to all the fine black men and wom[e]n in our community who have spent years and suffered far more hardships, deprivation and abuse, but who never would even dream of doing something like this defendant did b[a]ck in 1974. This defendant had more advantages than most young boys would have black or white.

T. 1701.

> Mr. Link will probably make some mention to you about the defendant's compassion and as the witnesses indicated, his ability to care about other people. Well, let me ask you this one question in closing, what did this nice guy murderer Jacob Dougan, what mercy did he show? Where was his mercy, where was his humanity, where was his morality, where was his feeling and where was his compassion on June 16, 1974?

T. 1718.

At its heart, the prosecutor's argument urged the jury to

ignore the profound and irrefutably positive contributions of Mr. Dougan to the community of Jacksonville -- to disbelieve them, to ignore them, to give them no consideration -- because of what he did to Stephen Orlando. To the white racist mentality of the prosecutor, a black person could not credibly be the contradiction that was Jacob Dougan. He could not be both of those things to the prosecutor, however, because the prosecutor could not appreciate that for most black people, particularly black civil rights activists, the same contradiction exists. While it is not often expressed in the terms in which Mr. Dougan expressed it, it nonetheless exists. And it exists precisely <u>because</u> of racism and racial oppression, not as an aberration which has nothing to do with racism. As the president of the Jacksonville chapter of the Southern Christian Leadership Conference so eloquently explained in his letter to Judge Olliff,

> It is easy to forget the full impact those, tumultuous times had on black people. While we reiterate that violence is never a solution to social problems, we cannot view the actions of Mr. Dougan and his co-defendants without recognizing the conditions which permeated Jacksonville at the time. For a Black Activist like Mr. Dougan, working towards social equality, the pressure to turn to violence was overwhelming. Our own founder, Dr. Martin Luther King, Jr., was murdered in 1968, an example to many that those who abided by non-violent means to achieve social change, became themselves the victims. Neither must we forget that Dr. King's views on the urgent necessity for change by non-violent means were not embraced by even the more liberal white community until other Black leaders began seriously to espouse the need for counter violence.

R. 1062.

Thus, the prosecutor's final plea was an overtly racist

plea. It was a plea to disregard the indisputable mitigation in Mr. Dougan's case based on a racist misunderstanding of the contradictory dynamics in his life. To a jury deliberately selected to act upon race bias, whose racism was aroused by the prosecutor's deliberate misuse of the facts of the case, which without exploitation provided "fertile soil for the seeds of racial prejudice," Robinson v. State, 520 So.2d at 7, these arguments made the recommendation of death a fairly simple decision.

As this Court has so carefully and conscientiously explained in Robinson, the Eighth and Fourteenth Amendments cannot tolerate such a racially motivated prosecution, particularly in a capital sentencing proceeding. 520 So.2d at 7-8. While some aspects of the prosecutor's strategy were properly objected to by defense counsel and others were not,[24] the absence of objection should be of no moment. This Court's "cases have long recognized that improper remarks to the jury may in some instances be so prejudicial that neither rebuke nor retraction will destroy their influence, and a new trial should be granted despite the absence of an objection below or even in the presence of a rebuke by the trial judge." Robinson v. State, 520 So.2d at 7 (citing cases). This is such a case. Further, in capital cases, even in the absence of objection, the Court is obliged to determine whether

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[24]The exclusions of prospective black jurors, peremptorily and for cause, were objected to, and the prosecutor's various inflammatory uses of the evidence were objected to. However, the arguments by the prosecutor were allowed to proceed without objection.

the death sentence was imposed in accord with the Constitution, Goode v. State, 365 So.2d 381, 384 (Fla. 1979), and to "review the evidence to determine if the interest of justice requires a new trial." Fla. R. App. Proc. 9.140(f). Under either of these safeguards as well, this case requires a new trial.

III. THE TRIAL COURT LIMITED THE JURY'S CONSIDERATION OF MITIGATING FACTORS AND FAILED TO INSTRUCT THE JURY CLEARLY THAT UPON A FINDING OF ANY MITIGATING CIRCUMSTANCES THEY COULD RECOMMEND LIFE IMPRISONMENT

The rules derived from Lockett v. Ohio, 438 U.S. 586 (1978), "are now well established ...." Skipper v. South Carolina, 476 U.S. 1, 4 (1986). See also Hitchcock v. Dugger, ___U.S.___, 95 L.Ed.2d 347 (1987). These rules require that the sentencer:

(a) "not be precluded from considering as a mitigating factor, any aspect of a defendant's character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death," Lockett v. Ohio, 438 U.S. at 604 (emphasis in original);

(b) not be permitted to "exclud[e] such evidence from [his or her] consideration," Eddings v. Oklahoma, 455 U.S. 104, 115 (1982) (emphasis supplied); and

(c) not be "prevent[ed] ... from giving independent mitigating weight to aspects of the defendant's character and record and to circumstances of the offense proffered in mitigation," Lockett v. Ohio, 438 U.S. at 605.

All of these rules were violated by the instructions to Mr.

Dougan's jury and by the court's pretrial ruling on the availability of Mr. Dougan's lack of any significant prior criminal activity as a mitigating circumstance.

A. The Instructions Created The Substantial Possibility That The Jury Could Not Give Effect To Its Consideration Of Mitigating Circumstances

The requirement that the sentencer not be precluded from giving "independent weight" to its consideration of mitigating circumstances means that the sentencer must be allowed to impose a life sentence on the basis of its consideration of any mitigating circumstance or circumstances -- even if it finds that the mitigating circumstances do not outweigh the aggravating circumstances -- so long as it believes that life is the proper sentence. In this sense, the finding of any mitigating circumstance must "be permitted, as such, to affect the sentencing decision." Lockett v. Ohio, 438 U.S. at 608. The sentencer's ability to impose a life sentence on the basis of mitigating circumstances cannot be made dependent on any other finding, except the finding that life is the appropriate sentence in the case. Thus, in Lockett the Court invalidated the Ohio statute because it made the sentencer's ability to impose a life sentence on the basis of nonstatutory mitigating circumstances dependent upon the finding of statutory mitigating circumstances. 438 U.S. at 607-608.

In Franklin v. Lynaugh, __U.S.__, 101 L.Ed.2d 155 (1988), a

majority of the Court reconfirmed the validity of this principle. Writing for herself and Justice Blackmun, Justice O'Connor explained that

> a State may not constitutionally prevent the sentencing body from giving effect to evidence relevant to the defendant's background or character or the circumstances of the offense that mitigates against the death penalty. Indeed, the right to have the sentencer consider and weigh relevant mitigating evidence would be meaningless unless the sentencer was also permitted to give effect to its consideration.

101 L.Ed.2d at 172-73 (O'Connor, J., joined by Blackmun, J., concurring). Addressing the same concern, Justice Stevens, writing for himself and Justices Brennan and Marshall, confirmed the views of the concurring justices:

> Our cases explicating the role of mitigating evidence in capital sentencing have rigorously enforced one simple rule: A sentencing jury must be given the authority to reject imposition of the death penalty on the basis of any evidence relevant to the defendant's character or record or the circumstances of the offense proffered by the defendant in support of a sentence less than death.

101 L.Ed.2d at 177 (Stevens, J., joined by Brennan and Marshall, JJ., dissenting).

The application of this principle in Florida means that if a jury has found mitigating circumstances, it must be free to recommend a life sentence even if it also finds that the mitigating circumstances do not outweigh the aggravating circumstances. The ability to recommend life cannot be made dependent upon the mitigating circumstances <u>outweighing</u> the aggravating circumstances.

The decisions of this Court and the standard jury

instructions which the Court has promulgated have been fully in accord with this principle. Indeed in its initial construction of the Florida death penalty statute, the Court interpreted the statute's requirement that the jury consider "whether sufficient mitigating circumstances exist which outweigh the aggravating circumstances," § 921.141 (2)(b), Fla. Stat. (1973), as simply requiring the jury to compare and weigh the aggravating and mitigating circumstances against each other in order to decide whether life or death is the proper sentence:

> [The jury] must consider from the facts presented to them ... whether the crime was accompanied by aggravating circumstances sufficient to require death, or whether there were mitigating circumstances which require a lesser penalty ....
>
> It must be emphasized that the procedure to be followed by the trial judges and juries is not a mere counting process of X number of aggravating circumstances and Y number of mitigating circumstances, but rather a reasoned judgment as to what factual situations require the imposition of death and which can be satisfied by life imprisonment in light of the totality of the circumstances present.

State v. Dixon, 283 So.2d 1, 8, 10 (Fla. 1973). Thereafter, in Alvord v. State, 322 So.2d 533, 540 (Fla. 1975), the Court explained that while the determination that mitigating circumstances do not outweigh aggravating circumstances is a prerequisite to recommending or imposing a death sentence, that determination does not mandate the imposition of a death sentence:

> The law does not require that capital punishment be imposed in every conviction in which a particular state of facts occur. The statute properly allows some discretion, but requires that this discretion be reasonable and controlled. No defendant can be

> sentenced to capital punishment unless the aggravating factors outweigh the mitigating factors. However, this does not mean that in every instance under a set state of facts the defendant must suffer capital punishment.

Id.

The standard jury instructions in effect when Mr. Dougan was re-sentenced make this point even more explicitly. The portion of the instructions concerning the jury's deliberative process explained that process in the following terms:

> If one or more aggravating circumstances are established, you should consider all the evidence tending to establish one or more mitigating circumstances and give that evidence such weight as you feel it should receive in reaching your conclusion as to the sentence that should be imposed ....
>
> The sentence that you recommend to the court must be based upon the facts as you find them from the evidence and the law. You should weigh the aggravating circumstances against the mitigating circumstances, and your advisory sentence must be based on these considerations.

Fla. Standard Jury Instructions -- Penalty 776. Plainly, under these instructions, a jury could appropriately determine that aggravating circumstances are weightier than mitigating circumstances but that the mitigating circumstances are weighty enough to recommend a life sentence.

The instructions in Mr. Dougan's case deviated radically from the standard jury instructions in this respect. Taken as a whole, they created a "substantial possibility," see Mills v. Maryland, __U.S.__, 100 L.Ed.2d 384, 395-96 (1988), that the jury may have believed that they could not recommend a life sentence unless they first found that the mitigating circumstances

outweighed the aggravating circumstances.

As instructed prior to the commencement of deliberations, Mr. Dougan's jury was unequivocally directed that if it found one or more aggravating circumstances and if it found further that the mitigating circumstances did not outweigh the aggravating circumstances, it was required to recommend a death sentence. This direction was given in connection with a verdict form which the court provided to the jury. See T. 1752-55. The form read as follows:

> We, the jury, rendering an advisory sentence to the Court as to whether the defendant should be sentenced to life imprisonment without the possibility of parole for 25 years or to death, find:
>
> 1. Sufficient aggravating circumstances
>
> _____do
> _____do not
>
> exist to justify a sentence of death.
>
> 2. Sufficient mitigating circumstances
>
> ____do
> ____do not
>
> exist, which outweigh any aggravating circumstances, to justify a sentence of life imprisonment rather than a sentence of death.
>
> 3. Based on those considerations,
>
> A. ___ Six or more members of the jury advise and recommend to the court that the defendant be sentenced to life imprisonment without the possibility of parole for 25 years.

B. ___ The majority of the members of the jury by a vote of ___ to ___ advise and recommend to the court that the defendant be sentenced to death.

R. 681.

The instructions given in connection with this form are set forth in full in Appendix F to the brief. In relevant part, these instructions told the jury,

> [As] to paragraph two, if you find that sufficient mitigating circumstances do not exist which outweigh any aggravating circumstances, then you would put an X on that second line which says, do not exist, which outweigh any aggravating circumstances to justify a sentence of life imprisonment rather than the sentence of death, and then you would go down to paragraph B--three B which says the majority of the members of the jury by a vote of blank to blank advise and recommend to the court that the defendant be sentenced to death....

T. 1754-55.

The prosecutor's argument confirmed and reiterated the jury's duty to recommend death if the mitigating circumstances failed to outweigh the aggravating circumstances. Throughout his argument, the prosecutor explained to the jury that its only task in considering mitigating circumstances was to determine whether they outweighed the aggravating circumstances. T. 1702 ("[s]o the question then becomes ... are there sufficient mitigating circumstances that outweigh and overcome these aggravating circumstances"); 1710-11 ("go ahead, ladies and gentlemen, ... evaluate these alleged mitigating circumstances and you see if they outweigh the aggravating circumstances that exist in this case"); 1716 ("Jacob Dougan ... has forfeited his

right to live ... due to the aggravating circumstances outweighing any mitigating circumstances").

Following closing arguments and instruction by the court, the jury began deliberating. In the course of deliberations, the jury requested that the court "repeat the instructions for completing the advisory verdict form." T. 1772. The court re-instructed the jury in the same fashion it had previously. T. 1775-77. Following the court's re-instruction, a juror asked the following question:

> Your Honor, in the event that the jury decides that sufficient aggravating circumstances exist to justify a death sentence and that sufficient mitigating circumstances do not exist, can -- is option three A [a life recommendation] precluded as an advisory sentence?

T. 1778.

In the conference between Judge Olliff and counsel thereafter, in which Judge Olliff was considering how to respond to this question, Judge Olliff understood the juror to be asking the following question:

> THE COURT: If they find that the aggravating circumstances outweigh the mitigating circumstances, that's what they -- that's what they indicate they have found, and they want to know if they find that the aggravating circumstances outweigh the mitigating circumstances, can they yet, despite the verdict form, can they despite the instructions recommend life. That's what they're asking.

T. 1784. Judge Olliff then expressed the view that neither the statute nor the verdict form permitted the jury to recommend life if they found that aggravating circumstances outweighed mitigating circumstances:

> THE COURT: They haven't indicated any confusion

> with it. They just asked if they can do something the statute so far doesn't provide. It doesn't provide it. They have not indicated any confusion, they say they understand it, but then they asked the question even though they find aggravating circumstances outweigh the mitigating circumstances, can they still recommend life rather than death. And under this verdict form they can't, it doesn't provide for that. Well, it doesn't provide for that.

T. 1785.

After further discussion with counsel, T. 1785-1811, Judge Olliff was persuaded that he should alter his instructions with respect to the verdict form. The suggestion made by the prosecutor was that the court "unlink" the findings from the sentence: "I would note, Judge, that the Court's instruction linking the finding of one thing to another, maybe they don't understand, I'm not sure they have to link those together the way the Court has done." T. 1809. Judge Olliff accepted this suggestion and decided to give "another instruction on [the verdict form] without saying that you have to go from here and do this." Id. He then re-instructed the jury as follows:

> Ladies and gentlemen of the jury, previously you asked me to read the verdict form to you and how you filled it out. I'm going to read that verdict form to you again, however it occurs to me that when I read it the first time I may have unintentionally misled you. So you will disregard the instructions which I previously gave you and follow this instruction: The advisory sentence. We, the jury rendering an advisory sentence to the Court as to whether the defendant should be sentenced to life imprisonment without the possibility of parole for 25 years or to death, find, and then paragraph number one says sufficient aggravating circumstances do or do not exist to justify a sentence of death. You would fill out whichever of those you deem appropriate from the evidence and the law.
>
> And paragraph two says, sufficient mitigating circumstances do or do not exist which outweigh any

> aggravating circumstances to justify a sentence of life imprisonment rather than a sentence of death. Would you fill out that as you deem appropriate from the law and evidence.
>
> Then paragraph number three says, based on those considerations, A, six or more members of the jury advise and recommend to the Court that the defendant be sentenced to life imprisonment without the possibility of parole for 25 years, B, that the majority of the members of the jury by a vote of blank to blank advise and recommend to the Court that the defendant be sentenced to death. You would fill out whichever of those you deem to be appropriate based on the law and the evidence which you have heard and which I have instructed you upon.

T. 1816-18.

Based on these facts, it is beyond reasonable dispute that the initial instructions to the jury concerning the verdict form, reinforced by the prosecutor's argument, directed the jury that it could not recommend a life sentence if aggravating circumstances outweighed mitigating circumstances. At the beginning of the conference in response to the jury's question, Judge Olliff and the prosecutor believed that this direction was in accord with Florida law, and Judge Olliff recognized that the verdict form plainly did not permit the jury to recommend life if they found that aggravating circumstances outweighed mitigating circumstances.

During the course of the conference, Judge Olliff recognized that the verdict form should not mandate a death recommendation in the event the jury found that aggravating circumstances outweighed mitigating circumstances. He attempted to cure this problem by directing the jury that they should simply answer each question on the verdict form on its own "as you deem appropriate

from the law and the evidence." T. 1816-18.

While this re-instruction partially cured the problem, it did not sufficiently cure it. The jury could still have been led by the verdict form itself to believe that they could recommend life only if mitigation outweighed aggravation. Question Two on the form required a response which plainly implied that if mitigating circumstances did not outweigh aggravating circumstances a life sentence was not justified:

> 2. Sufficient mitigating circumstances
>
> ___ do
> ___ do not
>
> exist, which outweigh any aggravating circumstances, to justify a sentence of life imprisonment rather than a sentence of death.

R. 681. A reasonable juror still could have believed -- even after being told by Judge Olliff to choose a life or death recommendation, after answering this question, as "appropriate based on the law and the evidence which you have heard," T. 1818 -- that he or she could not recommend life if the answer to Question Two was "do not." With such an answer, the juror would have found that because sufficient mitigating circumstances "do not" exist to outweigh the aggravating circumstances, a life sentence is not "justif[ied]." Particularly in light of the prosecutor's persistent theme that death must be the sentence if mitigating does not outweigh aggravation, see Downs v. Dugger, 514 So.2d 1069, 1072 (Fla. 1987) (recognizing that prosecutorial argument can compound Lockett instructional error); Floyd v.

State, 497 So.2d 1211, 1215 (Fla. 1986) (same), a juror reasonably could have reached this conclusion despite Judge Olliff's partial effort to remedy this problem.

Under the analysis of Lockett instructional error set forth in Mills v. Maryland, supra, the use of the verdict form thus deprived Mr. Dougan of his right to have the jury give "independent mitigating weight" to the mitigating evidence in his case. As Mills held, "Unless we can rule out the substantial possibility that the jury may have rested its verdict on the 'improper' [interpretation of the verdict form], we must remand for resentencing." 100 L.Ed.2d at 396. That "substantial possibility" cannot be ruled out here.

B. The Definition Of "Mitigating Circumstances" Was Not Sufficient To Inform The Jury Of Its Duty To Consider Mitigating Evidence Which Was Irrelevant To And Did Not Mitigate The Gravity Of The Crime

On the basis of Lockett and Eddings, it is clear that a capital sentencer has a duty to consider relevant mitigating evidence. While the scope of the mitigating evidence that must be considered plainly encompasses the defendant's "character" and "record" and the "circumstances of the offense", Lockett, 438 U.S. at 604; Eddings, 455 U.S. at 114, until recently there has been some confusion as to whether particular kinds of "character and record" evidence must be considered in the capital sentencing process. See Rogers v. State, 511 So.2d 526, 534-35 (Fla. 1987).

This issue was most clearly presented -- and settled -- in Skipper v. South Carolina, 476 U.S. 1 (1986). Skipper sought to

introduce in mitigation evidence of his good conduct in jail following his arrest. The three concurring justices in Skipper articulated the view that this evidence was irrelevant to the "defendant's 'character or record,' as that phrase was used in Lockett and Eddings." 476 U.S. at 12 (Powell, J., joined by Burger, C.J., and Rehnquist, J., concurring). In their view, relevant character or record evidence was limited to "evidence that lessens the defendant's culpability for the crime for which he was convicted." Id. Such evidence must "excuse[] the defendant's crime []or reduce[] his responsibility for its commission" to be the kind of "'mitigating evidence' that the sentencer must consider under the Constitution." Id. Since good behavior in jail after the crime obviously does not meet this definition of "character or record" evidence, the concurring justices would not have held that the exclusion of this evidence violated Lockett.

The six-justice majority rejected this limited definition of "character or record" evidence which must be considered in mitigation and held that Skipper's rights under Lockett were violated. In rejecting the concurring justices' views, the Court explained,

> Although it is true that any such [favorable] inferences [about Skipper's character arising from his good jail behavior] would not relate specifically to petitioner's culpability for the crime he committed,... there is no question but that such inferences would be 'mitigating' in the sense that they might serve 'as a basis for a sentence less than death.'

476 U.S. at 4-5 (quoting Lockett, 438 U.S. at 604). Accordingly,

Skipper plainly holds that the sentencer cannot be precluded from considering positive character and record evidence as a mitigating circumstance even though that evidence does not lessen the defendant's culpability for the crime he committed. Accord, Rogers v. State, 511 So.2d at 535 (holding that "[e]vidence of contributions to family, community, or society" must be considered as mitigating circumstances).

Skipper's resolution of this issue is highly relevant to Mr. Dougan's case, for the prosecutor argued to the jury that none of the evidence he proffered in mitigation should be considered as truly "mitigating," since none of that evidence lessened his moral responsibility for the crime. See T. 1703 ("how did any of these things [life history] mitigate what he did on the evening of June 16, 1974"); 1705-06 (failure of mitigation witnesses to "talk to [Mr. Dougan] about the circumstances of June 16, 1974" rendered their testimony "incredible"); 1718 ("let me ask you this one question in closing, what did this nice guy murderer Jacob Dougan, what mercy did he show? Where was his mercy, where was his humanity, where was his morality, where was his feeling and where was his compassion on June 16, 1974?").

Ordinarily, the court's instructions could be expected to help the jury evaluate this argument properly. However, the instructions here provided no guidance on this matter. Their only definition of "mitigating circumstances" was the following:

> [A]mong the mitigating circumstances you may consider if established by the evidence are any aspect of the defendant's character or record and any other circumstances of the offense.

T. 1749. While "any aspect of the defendant's character or record" is certainly broad enough to encompass all of Mr. Dougan's mitigating evidence, it is nevertheless true that much of that evidence was not relevant to his responsibility for the crime. Since three members of the Supreme Court have interpreted "any aspect of the defendant's character or record" as referring only to those aspects of character or record which mitigate responsibility for the crime, it is manifest that some of the members of Mr. Dougan's jury might have thought the same thing. Indeed, the possibility of this is substantial, since the prosecutor was arguing that this was how "any aspect of the defendant's character or record" ought to be construed.

Undoubtedly, the members of Mr. Dougan's jury could have understood the proper scope of mitigating circumstances had the judge explained it to them -- as the prosecutor's argument (which preceded the charge to the jury) demanded. However, Judge Olliff provided no guidance on this matter. As the Supreme Court observed in Mills v. Maryland, "while juries indeed may be capable of understanding the issues posed in capital-sentencing proceedings, they must first be properly instructed." 100 L.Ed.2d at 396 n. 10. In the circumstances of Mr. Dougan's case, therefore, the Court cannot "rule out the substantial possibility that the jury may have rested its verdict on the 'improper' [narrowing of the concept of "mitigating circumstances"]" id., and accordingly, must remand for resentencing.

C. The Trial Court Precluded Presentation Of The Mitigating Circumstance "No Significant History Of Prior Criminal Activity" By Ruling In Advance Of Trial That The State Would Be Able To Rebut That Circumstance With Evidence Of An Unadjudicated Offense

This Court granted Mr. Dougan a new sentencing trial because at his first trial, the State introduced evidence of his indictment for and involvement in another murder for which he had not been convicted, "for the sole purpose of aggravating Dougan's sentence." Dougan v. State, 470 So.2d 697, 701 (Fla. 1985). The introduction of this evidence for this purpose violated the settled rule that only evidence of prior convictions can be used to establish the aggravating circumstance set forth in § 921.141 (5)(b), Fla. Stat.: "The defendant was previously convicted of another capital felony or of a felony involving the use or threat of violence to the person." Id.

This issue arose again, in a different context, in Mr. Dougan's resentencing. Mr. Dougan sought to present evidence to show that he had "no significant history of prior criminal activity." § 921.141 (6)(a), Fla. Stat. (1983).[25] Because of notice to him by the State that if he presented this mitigating circumstance, the State would introduce evidence of the prior unadjudicated offense,[26] Mr. Dougan filed a motion asking the

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[25]At the time of the Orlando murder, Mr. Dougan had "a record showing one traffic related offense and two convictions for contempt of Court." R. 1115 (1975 sentencing order).

[26]The charge relating this offense was nolle prossed after Mr. Dougan's conviction. Dougan v. State, 470 So.2d at 701.

Court to preclude the State from utilizing this evidence in this fashion. R. 581. The Court denied the motion. R. 654. Rather than presenting the "no significant history" mitigating circumstance and inviting the State's introduction of the unadjudicated offense evidence in response, Mr. Dougan at that point forewent the presentation of this mitigating circumstance. The trial court's ruling, therefore, amounted to its precluding the presentation of this circumstance.

In its prior decisions, this Court has made a distinction between the evidence that is necessary to establish the "prior violent felony conviction" aggravating circumstance and the evidence that can be proffered to rebut the "no significant history" mitigating circumstance. A conviction is necessary to establish the aggravating circumstance, see Dougan v. State, 470 So.2d at 701; Odom v. State, 403 So.2d 936 (Fla. 9181); Perry v. State, 395 So.2d 170 (Fla. 1980); Provence v. State, 337 So.2d 783 (Fla. 1976), but an unadjudicated offense apparently can be proffered to rebut the mitigating circumstance, so long as the person has been arrested or charged with that offense and the evidence of the offense is presented by witnesses having "firsthand knowledge of [the defendant's] participation in the crimes." Dragovich v. State, 492 So.2d 350, 355 (Fla. 1986). Cf. Robinson v. State, 487 So.2d 1040, 1042 (Fla. 1986) (condemning the use of questions about other crimes -- for which there was no evidentiary support -- in cross-examining defendant's character witnesses).

Mr. Dougan submits that the differentiation between these two kinds of evidence should be abandoned, and that the Court should hold that only evidence of prior convictions can be used either to establish the aggravating circumstance or to rebut the mitigating circumstance. The reasons for this are twofold.

First, this Court has recognized that even if evidence of prior criminal activity is admitted for the exclusive purpose of rebutting the "no prior history" mitigating circumstance, it will be utilized as well by the sentencer as an aggravating circumstance.

> Whatever doctrinal distinctions may abstractly be devised distinguishing between the state establishing an aggravating factor and rebutting a mitigating factor, the results of such evidence being employed will be the same: improper considerations will enter into the weighing process.

Dragovich v. State, 492 So.2d at 355. Although this reasoning weighs heavily in favor of requiring all evidence of prior offenses to be supported by convictions -- since only evidence of convictions can properly be used in aggravation -- in Dragovich itself the Court seemed, in dicta, to be willing to allow evidence of unadjudicated offenses to rebut the "no prior history" mitigating circumstance. Id. at 355 (implying that if the defendant had been "arrested or charged" with the prior offenses and if the evidence of them was from "witnesses [with] first hand knowledge of the appellant's participation in the crimes," the evidence would be properly admitted). Since the Court realized that prior offense evidence, no matter how it is admitted into evidence, will be used in aggravation, see Robinson

v. State, 487 So.2d at 1042 ("[h]earing about other alleged crimes could damn a defendant in the jury's eyes"), there seems to be no more reason to permit the introduction of unadjudicated prior offense evidence to rebut the "no prior history" mitigating circumstance than there is to permit the introduction of such evidence to establish the "prior violent felony conviction" aggravating circumstance.

Second, the introduction of any unadjudicated offense evidence -- given its potential to "damn the defendant in the jury's eyes," Robinson v. State, supra -- creates profound constitutional concerns.

Every person charged with or suspected of having committed a crime in this country is presumed innocent until his/her guilt is found by an impartial fact-finder beyond a reasonable doubt. See In re Winship, 397 U.S. 358 (1970). These rights, by design, work to insure that a person is not subjected to punishment in the absence of a reliable finding of culpability.

The admission of unadjudicated offense evidence at the penalty phase of a capital trial circumvents these constitutional safeguards. The sentencer is asked to credit evidence of conduct for which the defendant must be presumed innocent, and without the assurance that a prior, impartial fact-finder has found the allegation meritorious. It must make its own assessment through an already jaded view of he defendant; it has just convicted the defendant of capital murder.

These concerns recently led Justice Marshall to call upon

the United States Supreme Court to squarely address this question. See Williams v. Lynaugh, ___U.S.___, 98 L.Ed.2d 270 (1987) (Marshall, J., dissenting from denial of certiorari). In Williams, Justice Marshall canvassed the states and found great disarray. While certain states prohibit the introduction of such evidence to ensure reliability in the capital sentencing process, State v. Bobo, 727 S.W.2d 945 (Tenn. 1987); State v. Bartholomew, 101 Wash.2d 631, 683 P.2d 1079 (1984) (en banc); State v. McCormick, 272 Ind. 272, 397 N.E.2d 276 (1979); Cook v. State, 369 So.2d 1251 (Ala. 1979), other states permit its introduction without any safeguards, Fair v. State, 245 Ga. 868, 268 S.E.2d 316 (1980), while others permit its introduction only when accompanied by a reasonable doubt instruction. People v. Easley, 187 Cal. Rptr. 745, 654 P.2d 1272 (1982).

At bottom, Justice Marshall found substantial reason for concern.

> In my view, imposition of the death penalty in reliance on mere allegations of criminal behavior fails to comport with the constitutional requirement of reliability. A conviction signals that the underlying criminal behavior has been proved beyond a reasonable doubt to the satisfaction of an unbiased jury in conformance with constitutional safeguards. The testimony on which the state relied in this case, by contrast, carried with it no similar indicia of reliability.

Williams v. Lynaugh, 98 L.Ed.2d at 272.

For these reason, the Court should hold that the trial court erred in denying Mr. Dougan's motion in limine and grant him a new sentencing hearing due to the exclusion of relevant mitigating evidence resulting from the court's erroneous ruling.

IV. THE INSTRUCTIONS ON THE AGGRAVATING CIRCUMSTANCES FAILED ADEQUATELY TO INFORM THE JURY WHAT IT MUST FIND TO IMPOSE THE DEATH PENALTY, THUS FAILING TO GUIDE THE JURY'S DISCRETION AS REQUIRED BY THE EIGHTH AMENDMENT

"Since Furman [v. Georgia, 408 U.S. 238 (1972)], our cases have insisted that the channeling and limiting of the sentencer's discretion in imposing the death penalty is a fundamental constitutional requirement for sufficiently minimizing the risk of wholly arbitrary and capricious action." Maynard v. Cartwright, ___U.S.___, 100 L.Ed.2d 372, 380 (1988). See also Godfrey v. Georgia, 446 U.S. 420 (1980). Under this settled principle, a particular aggravating circumstance may be challenged if it "fails adequately to inform juries what they must find to impose the death penalty and as a result leaves them and appellate courts with the kind of open-ended discretion which was held invalid in Furman ...." Maynard v. Cartwright, 100 L.Ed.2d at 380.

Judge Olliff directed the jury in Mr. Dougan's case to consider three aggravating circumstances. The only direction that he gave as to their meaning and application was in his recitation of the circumstances:

> The aggravating circumstances that you may consider are limited to any of the following that are established by the evidence, that is, number one, that the crime for which the defendant is to be sentenced was committed while he was engaged in or an accomplice in the commission of or an attempt to commit the crime of kidnapping. And two, that the crime for which the defendant is to be sentenced was especially wicked, evil, atrocious or cruel, and three, that the crime for

> which the defendant is to be sentenced was committed in a cold, calculated and premeditated manner without any pretense of moral or legal justification.

T. 1749. All of these circumstances are subject to challenge for the reasons articulated in Maynard.

A. Especially Wicked, Evil, Atrocious or Cruel

Maynard was concerned with the identical aggravating circumstance in the Oklahoma death penalty statute, although in Mr. Cartwright's case, in contrast to Mr. Dougan's case, the circumstance was instructed in its statutory formulation, "especially heinous, atrocious or cruel." The trial court in Maynard instructed the jury to consider whether the murder was especially heinous, atrocious or cruel and provided the following definitions of the terms used in this circumstance:

> Oklahoma has defined 'heinous' as 'extremely wicked or shockingly evil' and 'atrocious' as 'outrageously wicked and vile'...[and] 'cruel' as 'designed to inflict a high degree of pain with utter indifference to, or even enjoyment of, the suffering of others'....

Cartwright v. Maynard, 822 F.2d 1477, 1489 (10th Cir. 1987)(en banc).

Relying on the Supreme Court's analysis in Godfrey v. Georgia, 446 U.S. at 428-29, the Tenth Circuit found that there was nothing in the terms used in the formulation of this circumstance or, with one exception, in the definition of these terms, that provided enough guidance for the sentencer to know whether the circumstance was applicable to a particular crime or not. 822 F.2d at 1489. The possible exception to this was the definition of "cruel." Id. at 1489-90. However, the sentencer

was not required to find that the murder was cruel in order to find this circumstance, since the terms of the circumstance were set forth in the disjunctive. Id. Thus, any potential that this definition had for limiting the application of the aggravating circumstance was lost. Id. The Supreme Court agreed with this analysis, explaining that even in light of the attempts to define the terms of this circumstance, "an ordinary person could honestly believe that every unjustified, intentional taking of human life is 'especially heinous.'" Maynard v. Cartwright, 100 L.Ed.2d at 382.

The use of the "especially wicked, evil, atrocious or cruel" circumstance in Mr. Dougan's case was flawed for the very same reasons.

The sentencer's difficulty in ascertaining what she or he must find in order to determine the applicability of this circumstance is strikingly demonstrated in Mr. Dougan's case. Thirty minutes after deliberations began, the jury asked the court for some dictionaries. T. 1756-57. Judge Olliff asked the jury why it needed dictionaries, the response was, "when we were reviewing the aggravating circumstances for the crime, two of the terms used were heinous and atrocious and we were looking for the definitions of those two." T. 1760. Judge Olliff thereafter responded to the jury's inquiry by explaining that "heinous" was no longer a part of the charge,[27] and by providing the following

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[27]He further noted, "I think where you got that is during Mr. Kunz's final closing argument he had a chart before you and one of the words on there was heinous...." T. 1770.

definitions of "atrocious" and "cruel":

> [A]trocious means outrageously wicked and vile[;] cruel means designed to inflict a high degree of pain with utter indifference to or enjoyment of the suffering ... of others.

T. 1766. See T. 1770-71.

These definitions suffered the same flaws as the definitions in Maynard. Defining atrocious as "outrageously wicked and vile" simply connected "atrocious" to the terms used in the similar aggravating circumstance in the Georgia statute, which was condemned in Godfrey. Maynard, 100 L.Ed.2d at 382. See Godfrey v. Georgia, 446 U.S. at 428 ("[a] person of ordinary sensibility could fairly characterize almost every murder as 'outrageously or wantonly vile, horrible and inhuman'"). While the definition of cruel provided some potential for limiting the application of the circumstance, that potential was lost, as it was in Maynard, by the disjunctive connection of "cruel" to "wicked, evil, [or] atrocious."

Accordingly, while the jury might have focused on a limiting aspect of this circumstance -- on the basis of the definition of cruel -- it was not required to. It was left to determine, without any real guidance, whether this circumstance was applicable. Certainly there were aspects of this homicide that might have legitimately supported finding of this aggravating circumstance. Mr. Orlando was stabbed repeatedly before he was shot, was probably aware of his impending death, and may have been shot "execution-style." Each of these factors has on occasion been held sufficient to support a finding of this

circumstance. See, e.g., Washington v. State, 362 So.2d 658 (Fla. 1978) (stab wounds followed by shot to the head); Clark v. State, 443 So.2d 973, 977 (Fla. 1984) (anticipation of death); Ford v. State, 374 So.2d 496, 502 n.1 (Fla. 1979) (execution-style). Even in these respects, however, the applicability of this circumstance is questionable, for Mr. Dougan did not himself stab the victim, and under the Eighth Amendment, culpability in a death case must individualized. Enmund v. Florida, 458 U.S. 782, 798 (1982).

More importantly, however, there were aspects of the homicide which could not properly have supported the finding of this circumstance. For example, as we have already demonstrated, the prosecutor urged the jury to find this circumstance principally because of the fear and anguish suffered by the victim before he died. T. 1689. But the prosecutor characterized the victim's fear and anguish in such a way that it could have evoked the jury's deeply-imbedded racist fears of violent, threatening black people, and this feeling, rather than an objective assessment of the victim's mental state, may have led the jury to find this circumstance.

A reviewing court cannot know whether the jury rested its sentencing recommendation, in whole or part, on this impermissible ground. However, the instructions did not prevent them from doing so, and it is precisely this opportunity for the exercise of "open-ended discretion" which the Supreme Court has condemned from Furman to Maynard. Maynard v. Cartwright, 100

L.Ed.2d at 380. As Justice O'Connor has observed in a different context but in terms equally applicable here, "[w]e may not speculate as to whether [the capital sentencer deliberated in accord with Eighth Amendment requirement].... [Our cases] require us to remove any legitimate basis for finding ambiguity concerning the factors actually considered by the trial court." Eddings v. Oklahoma, 455 U.S. at 119 (O'Connor, J., concurring).

B. Cold, Calculated, and Premeditated, Without Any Pretense of Moral or Legal Justification

In directing the jury to consider this aggravating circumstance without any guidance as to its application, Judge Olliff again left the jury "with the kind of open-ended discretion which was held invalid in Furman...." Maynard v. Cartwright, 100 L.Ed.2d at 380.[28] This instructional failure seriously prejudiced Mr. Dougan, because it deprived him of a properly guided determination of whether the murder was committed "without any pretense of moral or legal justification."[29]

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[28]In arguing here that the instructions with respect to this circumstance created a Godfrey-Maynard violation, Mr. Dougan does not concede the propriety of instructing the jury at all with respect to this circumstance. In Issue VIII, infra, he argues that the use of this circumstance in Mr. Dougan's case violates the Ex Post Facto Clause of the Constitution.

[29]The instructions also permitted the jury to equate "cold, calculated, and premeditated" with the simple premeditation necessary for conviction of first degree murder. Such an equation broadens the application of this circumstance far beyond the narrower scope intended by the legislature. See Rogers v. State, 511 So.2d at 533 (the premeditation referred to in this aggravating circumstance is a "heightened premeditation" involving "calculation," which "consists of a careful plan or prearranged design"). However, this error was harmless here, for the jury could properly have found this element of the

In order to find the "cold, calculated" circumstance applicable, the sentencer must make two subsidiary findings: (1) that the murder was committed with the "heightened premeditation" described in Rogers v. State, 511 So.2d at 533, and (2) that the murder was committed "without any pretense of moral or legal justification." Without any guidance from the trial judge, Mr. Dougan's jury was left to make a wholly discretionary decision as to the second of these findings.

The prosecutor argued that there was no pretense of moral justification because the motive for the murder was to "select a person, solely due to the color of his skin... and execute[] him." T. 1697. The prosecutor then argued that the only kind of murder which might be committed with a pretense of moral or legal justification or legal justification was a spontaneous killing in the course of a "rob[bery], for example, [where the] victim makes some sort of move and ... one of the defendants pulls out a gun and shoots them." T. 1697.

The defense argued that there was a pretense of moral justification, for "the motive was not simply hatred of white people." T. 1727. Based on the State's own case, including the note left with the body and the tapes announcing the start of a race war for the purpose of winning freedom for black people, the defense argued,

> The true purpose of the murder was obvious, it was to scare and in fact William Hearn indicated that's what Jacob Dougan said, it was for we are going to scare

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aggravating circumstance on the basis of the facts before it.

> some people. It was to scare white government into responding to the needs of the black people. It was to scare them. It was to scare their responses, it was to force a response from white government. The ends don't justify the means, I'm not suggesting that they do, they never do. The ends never justify the means, but there was . . . a desirable end result racial equality.

T. 1728. See also T. 1729-30.

In the way this issue was argued, and on the basis of the indisputable facts, the legal meaning of "pretense of moral or legal justification" was the critical determinant of whether or not the jury found this aggravating circumstance. Whether the "pretense" is limited to quasi-self defense killings or is broad enough to encompass killings mistakenly and misguidedly committed to enhance a societally-desired goal was the question before the jury. However, the jury should not have been given the responsibility for resolving this question. It is precisely the kind of guidance that Godfrey and Maynard require the trial judge to provide to the sentencer in order to avoid the sentencer's exercise of "open-ended discretion." Maynard, 100 L.Ed.2d at 380.

In such a context, "arguments of counsel cannot substitute for instructions by the court." Taylor v. Kentucky, 436 U.S. 478, 488-89 (1978). It is the duty of the court to "channel the sentencer's discretion by 'clear and objective standards' that provide 'specific and detailed guidance,' and that 'make rationally reviewable the process for imposing a sentence of death.'" Godfrey v. Georgia, 446 U.S. at 428.

Manifestly, the proper carrying out of this duty in Mr.

Dougan's case would not have been an empty exercise. This Court has not expressly limited the application of this clause in the manner argued by the State before Mr. Dougan's jury. See Cannaday v. State, 427 So.2d 723, 730-31 (Fla. 1983). Rather, it has never articulated the boundaries of this clause. Under any reasonable interpretation of it, however, Mr. Dougan's motive established that he acted with a pretense of moral justification. See Kennedy, Florida's "Cold, Calculated and Premeditated" Aggravating Circumstance in Death Penalty Cases, 17 Stetson L.Rev. 47, 101-104 (1987).

Accordingly, Mr. Dougan was severely prejudiced by the trial court's failure to comply with the dictates of Godfrey and Maynard in relation to the "cold, calculated" aggravating circumstance.

C. Murder in the Course of Kidnapping

Judge Olliff's final instructional failure under Godfrey and Maynard was his failure to define the crime of kidnapping with respect to the felony murder aggravating circumstance. As a result, the jury was again left without guidance as to the legal standards to employ in the consideration of this circumstance. As with the "cold, calculated" circumstance, the consequences for Mr. Dougan were severe: The jury may have found a circumstance for which there was no evidentiary support.

The crime of kidnapping in Florida requires as an element that the victim be "forcibly" confined or restrained. See Ross v. State, 15 Fla. 55 (1875); Holroyd v. State, 127 Fla. 152, 172

So. 700 (1937). Thus, even though the defendant intends to kidnap, neither the crime nor the attempt to commit the crime occurs until the defendant takes some overt step to confine or restrain the victim. Ross v. State, supra; Holroyd v. State, supra. See also Miller v. State, 233 So.2d 448 (Fla. 1st DCA 1970); Wilkes v. State, 182 So.2d 480 (Fla. 1st DCA 1966); Gordon v. State, 145 So.2d 896 (Fla. 2d DCA 1962).

In Mr. Dougan's case, there was no evidence of forcible constraint until the car arrived on the dirt road, and Mr. Dougan purportedly said to Mr. Orlando, "this is it, sucker." T. 922. See Statement of the Case, supra. Within moments thereafter, Mr. Orlando was dead. The legal issue presented by these facts is whether such a set of facts establishes a "kidnapping," and if so, whether these facts can establish that the murder "was committed while [the defendant] was engaged in... the commission of or an attempt to commit kidnapping." T. 1749. If it can, then this circumstance is applicable to every homicide in which the victim becomes aware of a threat to his well-being, tries to run away, is restrained, and killed. Such an application would be too broad to satisfy the narrowing requirement of the Eighth Amendment. See Zant v. Stephens, 462 U.S. 862, 877-78 (1983).

V. IN SENTENCING MR. DOUGAN TO DEATH, JUDGE OLLIFF FAILED TO CONSIDER IN MITIGATION THE MITIGATING CIRCUMSTANCES THAT WERE ESTABLISHED BY THE EVIDENCE, AND CONSIDERED IN AGGRAVATION AGGRAVATING CIRCUMSTANCES THAT WERE NOT ESTABLISHED BY THE EVIDENCE

Judge Olliff's sentencing order is set forth at R. 1077-

1104.[30] Although various aspects of his order deserve specific attention from this Court, before Mr. Dougan addresses those matters, it is important for the Court to know in advance the consistent and driving theme that runs throughout the order. Virtually all of Judge Olliff's findings, as to both mitigating and aggravating circumstances, are imbued with his horror at what he perceived to be the underlying motivation of the murder of Stephen Orlando: race hatred and a desire to start a racial war. See R. 1090-91; 1096; 1097-98; 1100-1102. In his remarks from the bench when the death sentence was imposed, Judge Olliff reiterated this theme and equated what he perceived as Mr. Dougan's motivation with the motivation of the Nazis in World War II -- to undertake "a war of racial and religious extermination." T. 1849.

While we do not fault Judge Olliff for being horrified at the acts which took place in relation to Stephen Orlando, we do fault him -- and this Court should too -- for misunderstanding and mischaracterizing the motivation behind those acts, and in particular, for equating that motivation with the motivation of the Nazis. The fundamental flaw in Judge Olliff's perspective is his failure to appreciate what the facts spread over the entire record unequivocally demonstrate: that the racial animus which motivated this crime was a racial animus created by, nourished by, and brought into action by, the racial animus continually

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[30]For the Court's convenience, a copy of the order has been included with the brief as Appendix G.

directed against black people by white institutions and white people in Jacksonville and elsewhere. Mr. Dougan's acts were motivated by hatred, but it was a hatred born of racial oppression and victimization by white people and institutions, not a hatred born of evil, malevolence, or feelings of superiority.

Mr. Dougan's acts are thus more appropriately analogized, in Judge Olliff's terms, to the deeds that some Jews in Germany might have undertaken during Hitler's rule -- Jews who after years of oppression said, "no more," and who struck out, indiscriminately, at the first Aryan German available, and who proclaimed that they would continue these acts until the Jews were no longer oppressed. Such persons might well be condemned for indiscriminate, racially-or-religiously-motivated violence, but they would certainly not be condemned to death for it, for the motivation behind their acts would be understood as having been created by racial and religious oppression.

It is around this core set of facts that this case turns, and it is, above all, Judge Olliff's failure to appreciate this core set of facts which led him to impose the death sentence.

A. The Judge's Failure to Consider in Mitigation the Mitigating Circumstances Established by the Evidence

Mr. Dougan proffered mitigating evidence related to four distinct areas of mitigation: (1) positive character traits, evidenced by his extraordinary contributions to his community; (2) the contribution of racial oppression to the homicide; (3)

his great potential for rehabilitation; and (4) the inequality in sentencing between him and his codefendants. The first three mitigating circumstances were unequivocally supported by the record and were unquestionably "mitigating," in the sense that they could reasonably have called for a sentence less than death. See Skipper v. South Carolina, 476 U.S. at 4-5. Nevertheless, Judge Olliff failed to consider any of them as mitigating. The fourth mitigating circumstance -- inequality in sentencing -- was appropriately rejected as a mitigating circumstance. See Barclay v. State, 470 So.2d at 695 (holding "there was a rational basis for the jury's distinction between these co-defendants" based on Mr. Dougan's playing a greater leadership role in this incident).[31]

The analytical framework for evaluating Judge Olliff's findings with respect to mitigating circumstances was set forth by the Court in Rogers v. State, 511 So.2d 526 (Fla. 1987):

> [W]e find that the trial court's first task in reaching its conclusions is to consider whether the facts alleged in mitigation are supported by the evidence. After the factual finding has been made, the court then must determine whether the established facts are of a kind capable of mitigating the defendant's punishment, i.e., factors that, in fairness or in the totality of the defendant's life or character may be considered as extenuating or reducing the degree of moral culpability for the crime committed. If such factors exist in the record at the time of sentencing, the sentencer must determine whether they are of sufficient weight to counterbalance the aggravating factors.

Id. at 534. When Judge Olliff's process of considering mitigating circumstances is evaluated in light of these

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[31]But see Issue VI, infra.

requirements, it is plain that he failed to give constitutionally appropriate consideration to the first three mitigating circumstances proffered by Mr. Dougan.

Mr. Dougan's first mitigating circumstance -- his positive character traits, as revealed by his contributions to the community -- was established by the testimony of twenty witnesses. See T. 1327-1525. No witness disputed the testimony of these witnesses, who described Mr. Dougan's extraordinary and varied contributions to bettering the lives of children, youth, adults, and elderly people in his community. Id. Judge Olliff characterized this mitigating evidence as follows:

> OFFERED AS MITIGATION:
>
> The defendant presented a number of fine citizens who testified as to his character.
>
> The defense attorney put on evidence and testimony of the defendant's civil rights activities and his social, health, and welfare work which benefitted the community. He had been involved in scouting, band, coaching, and had established a Karate school where he gave free lessons.

R. 1089-90.

Without determining whether these facts alleged in mitigation were supported by the evidence, Judge Olliff immediately determined that they were not "of a kind capable of mitigating the defendant's punishment," Rogers v. State, 511 So.2d at 534. His reasoning was that Mr. Dougan really did not have positive character traits -- that he had simply used his apparent good works as a subterfuge for his racial hatred:

> The evidence, however, shows that at the karate school the defendant established himself as the leader of his

> students (who soon became his co-defendants in murder) and there he talked racial war, revolution -- and planned the murder of Stephen Anthony Orlando,
>
> It was at that school that Dougan and his co-defendants gathered after that murder and Dougan decided the next move (to make tape recordings boasting of the murder) in his efforts to start a racial war.
>
> The defendant was engaged in an apparent social work -- and yet, at the same time he committed premeditated first degree murder, preached violent revolution and tried to start a racial war.
>
> Conclusion:
>
> The character witnesses, of course, knew none of the facts of the murder of Stephen Anthony Orlando -- nor did they know of the defendant's activities at the time of the murder.
>
> The defendant was a personality of extreme opposites. For every quality, he had a balancing fault -- an overwhelming fatal fault.

R. 1090-91.

It is apparent from this analysis that Judge Olliff refused to consider as mitigating the positive traits established by Mr. Dougan's evidence. The evidence showed conclusively that for years Jacob Dougan worked exhaustively, earnestly, steadfastly, and compassionately to bring about material improvements in the lives of the people in his community. He was not, as Judge Olliff found, only engaged in "apparent social work" all this time while he secretly fomented revolution. The evidence shows that the plan for "premeditated first degree murder, . . . violent revolution and race war," R. 1090-91, was conceived -- as Judge Olliff himself found -- only "hours" or "possibly days" before the murder of Stephen Orlando. R. 1101-02. Judge Olliff let the acts of Mr. Dougan immediately before, during, and after

June 16, 1974 speak for his whole life, and in the process, refused to consider as mitigating the profoundly positive character traits that Mr. Dougan had evinced up until June 16, 1974. As this Court observed in Rogers v. State, "Evidence of contributions to family, community, or society reflects on character and provides evidence of positive character traits to be weighed in mitigation." 511 So.2d at 535. Judge Olliff, in disregard of the mandate of the Eighth Amendment, refused to weigh Mr. Dougan's extraordinarily positive character traits in mitigation.

Mr. Dougan's second mitigating circumstance -- the contribution of racial oppression to the homicide -- was also disregarded as mitigating despite its unequivocal mitigating value. None of the evidence called into question the contribution of racial oppression to Mr. Dougan's actions. Every public or private utterance attributed to Mr. Dougan about the murder demonstrated that the murder was committed for the sole purpose of freeing black people from white racist oppression. See T. 911-12 (note left on the body); T. 1077 (testimony of Edred Black about making tapes); T. 1173-77 (tapes sent to media). Nothing suggested that the killing was based solely on racial hatred. To the contrary, the racial hatred which was expressed was a hatred engendered by the racism directed against black people and the oppression of black people by white people, white institutions, and white governmental authority.

Judge Olliff refused to consider the mitigating quality of this evidence, because no one else responded to "racial unrest" in Jacksonville the way Mr. Dougan did:

> There was racial unrest and tempers among some blacks and some whites were short. It was a time of great change, and many were disturbed. However, of all the citizens of this city, only Dougan committed first degree murder and attempted to start a suicidal racial war. His was not just an act to hasten civil rights--it was much more, it was done (according to his own words on the tape recording) to bring about revolution and carnage.
>
> * * * *
>
> To suggest that the defendant had some lofty mission in life and that he could scoff at the law and slaughter an 18-year-old boy and not be held fully accountable because of the temper of the times -- is nonsense.

R. 1098.

With this analysis, Judge Olliff again ignored his duty to treat and consider as mitigating evidence that which is truly "mitigating": "factors that, in fairness or in the totality of the defendant's life or character may be consider as extenuating or reducing the degree of moral culpability of the crime committed." Rogers v. State, 511 So.2d at 534. As a response to the racial oppression of himself and other black people, Mr. Dougan's acts were less culpable, because they were a response to a hostile external environment. For this reason, even though he plainly intended to kill -- or as Judge Olliff found, "to bring about revolution and carnage" -- his acts were less culpable. As Justice O'Connor explained in Tison v. Arizona, ___ U.S. ___, 95 L.Ed.2d 127 (1987),

> A narrow focus on the question of whether or not a given defendant 'intended to kill' . . . is a highly unsatisfactory means of definitively distinguishing the most culpable and dangerous of murderers. Many who intend to, and do, kill are not criminally liable at all -- those who act in self-defense or with other justification or excuse. Other intentional homicides, though criminal, are often felt undeserving of the death penalty -- those that are the result of provocation.

Id. at 144.

Jacob Dougan's crime was the result of a personal lifetime's worth of racially-based provocation, and of a whole people's centuries' worth of racially-based provocation. It was neither justifiable nor excusable. That is why it was criminal and that is why it should be punished. That is also why no other citizens of Jacksonville committed such a crime. People have infinitely varying tolerance for provocation, and provocation is never a justification for homicide. But if someone's tolerance for provocation comes to an end, and he kills in response, such homicides "are often felt undeserving of the death penalty." Judge Olliff failed to recognize this and accordingly, refused to consider Mr. Dougan's second mitigating circumstance.

Mr. Dougan's third area of mitigation -- his potential for rehabilitation -- was given no consideration at all by Judge Olliff. No witnesses disputed Mr. Dougan's "excellent" potential for rehabilitation, T. 1277, as that potential was documented and explained by Dr. Krop. T. 1260-61; 1277-78; 1289. Moreover, there is no doubt that these "facts are of a kind capable of mitigating the defendants punishment," Rogers v. State, 511 So.2d at 534. Both the Supreme Court and this Court have recognized

that the potential for rehabilitation is a mitigating circumstance that must be considered in a capital sentencing proceeding. See Skipper v. South Carolina, 476 U.S. at 4-5; Simmons v. State, 419 So.2d 316, 320 (Fla. 1982).

Nevertheless, Judge Olliff made no mention whatsoever of this mitigating circumstance in his findings. While the defendant's capacity for rehabilitation is sometimes considered an aspect of the defendant's character, see Simmons, supra, Judge Olliff did not consider it in his findings concerning Mr. Dougan's positive character traits. See R. 1089-90 (noting only character traits based upon Mr. Dougan's contributions to the community before his arrest for the Orlando homicide). He failed altogether to enter any findings as to this circumstance. When this Court is "unable to discern from the trial court's order whether it considered [certain] factors as ... mitigating circumstances" -- due to the absence of any findings concerning those mitigating circumstances -- the Court must conclude that "the trial court may not have considered those ... factors." Moody v. State, 418 So.2d 989, 995 (Fla. 1982). See also Lamb v. State, ___So.2d___, 13 F.L.W. 530, 532 (Fla. September 9, 1988). Accordingly, Judge Olliff also likely excluded from consideration as a mitigating circumstance Mr. Dougan's potential for rehabilitation.

B. The Judge's Consideration of Aggravating Circumstances Not Supported by the Evidence

Judge Olliff found that three aggravating circumstances were

established by the evidence: (1) the murder was "especially wicked, evil, atrocious, or cruel," R. 1100-1101; (2) the murder was committed in a "cold, calculated, and premeditated manner without any pretense of moral or legal justification," R. 1101-1102; and (3) the murder was committed while Mr. Dougan was "engaged in ... the commission of ... the crime of kidnapping." R. 1099. None of these circumstances was supported by the evidence.

1. Especially heinous, atrocious or cruel

In finding that the evidence established the "especially heinous, atrocious or cruel" circumstance, Judge Olliff relied on the following facts:

> Dougan, together with the other defendants, premeditatedly and deliberately stalked their victim and brutally murdered him.
>
> The victim's only crime was that he was of a different racial group than his murders. He in no way offended them - except by being white - nor did he even know them before that fatal evening.
>
> The victim, Stephen Anthony Orlando, was knocked to the ground and repeatedly stabbed, taunted, and tortured. As he writhed in pain and begged for mercy, Dougan placed his foot on the 18-year-old boy's head and shot him dead.
>
> This was an unprovoked, premeditated murder and a declaration of war against a racial group -- with the promise of more violence, death, and revolution to come.

R. 1100-1101.

This Court's prior decisions narrowing the application of this circumstance preclude reliance on several of the facts relied upon by Judge Olliff. This circumstance properly focuses

upon the physical pain and suffering inflicted upon the victim and the mental anguish suffered by the victim before death. See, e.g., Amoros v. State, ___So.2d___, 13 F.L.W. 560, 562 (Fla. September 13, 1988); Lloyd v. State, 524 So.2d 396, 402-03 (Fla. 1988); Koon v. State, 513 So.2d 1253, 1257 (Fla. 1987); Scott v. State, 494 So.2d 1134, 1137 (Fla. 1986). Thus, "premeditatedly and deliberately stalk[ing]" Mr. Orlando was irrelevant.[32] Similarly, the fact that this was an "unprovoked, premeditated murder" that was racially-motivated and part of a plan for revolutionary warfare is irrelevant. None of these facts had any effect on the degree of the victim's physical suffering or mental anguish.[33] Accordingly, the only facts which could possibly support the "especially heinous" circumstance are the facts concerning the murder itself.

Before analyzing the sufficiency of these facts to support the finding of this circumstance, the Court must take care to attribute to Mr. Dougan only responsibility for his acts in the course of the homicide. As the Supreme Court has held, the capital sentencer must determine

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[32]"Stalking" can be relevant if the victim is aware of being stalked and experiences the anguish of anticipating death as a result. See Phillips v. State, 476 So.2d 194 (Fla. 1985). There is no evidence that Mr. Orlando was aware of being stalked, however.

[33]Further, Judge Olliff's continued reliance on the call for a black revolution is at odds with this Court's opinions in both Dougan v. State, 470 So.2d at 702 and Barclay v. State, 470 So.2d at 695. As the Court explained in Barclay, the call for black revolution is no more than "[a] prediction of future conduct or events ... [which] will not support finding an aggravating factor." Id.

> the validity of capital punishment for [the defendant's] own conduct. The focus must be on his culpability, not on that of those who committed the robbery and shot the victims, for we insist on individualized consideration as a constitutional requirement in imposing the death sentence.

Enmund v. Florida, 458 U.S. 782, 798 (1982).

In light of this, Mr. Dougan cannot be held accountable for the multiple stabbing of Mr. Orlando, for only Mr. Barclay committed those acts. See T. 923. The acts whose consequences are attributable to Mr. Dougan are twofold: (1) the revelation to the victim that he was in danger -- when he, Dougan, Barclay, Crittenden, and Evans got out of the car on the dirt road, Dougan said, "This is it sucker," and knocked him down to prevent him from running off; and (2) the two shots fired into the victim's head.

Based only on the acts whose consequences are attributable to Mr. Dougan, Judge Olliff's finding of "especially heinous, atrocious or cruel" cannot be sustained. Killing someone by gunshot wounds to the head, causing instantaneous loss of consciousness, does not produce the kind of suffering that supports this circumstance. See Amoros v. State, 13 F.L.W. at 562; Lloyd v. State, 524 So.2d at 402-03; Oats v. State, 446 So.2d 90 (Fla. 1984). Further, even though the victim certainly apprehended danger when Mr. Dougan threatened him and prevented him from running off, this occurred only moments before Mr. Dougan shot him, and Mr. Dougan cannot bear responsibility for any mental anguish the victim suffered as a result of the stabbing by Barclay. The mere apprehension of danger, even of

death, that accompanies nearly every murder is not sufficient to sustain a finding of "especially heinous, atrocious or cruel." See Amoros v. State, 13 F.L.W. at 562 ("'the victim made a futile attempt to save his life by running to the rear of the apartment, only to find himself trapped at the back door,'" but this did not establish sufficient mental anguish); Lewis v. State, 377 So.2d 640, 646 (Fla. 1979) (same). To sustain the finding of the circumstance, the apprehension of death must be greater, as for example through a slow and painful infliction of death, Hildwin v. State, __So.2d__, 13 F.L.W. 528, 530 (Fla. September 9, 1988) (strangulation), the infliction of death only after several failed attempts, of which the victim was "acutely aware," Cooper v. State, 492 So.2d 1059, 1062 (Fla. 1986), or the infliction of death after extended physical abuse, Scott v. State, 494 So.2d at 1137.[34]

Under controlling precedent, therefore, the "especially heinous" circumstance cannot be sustained against Mr. Dougan

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[34]As to Mr. Barclay, however, this circumstance could be sustained, for Barclay is the person who inflicted the physical abuse and the acute mental anguish. Significantly, the State conceded this very point in the oral argument before this Court in Barclay v. State, No. 64, 765, on April 2, 1984. As the Assistant Attorney General explained,

> [V]iewing these two men, Barclay is the most reprehensible of the two. And I'll tell you why. Because he's the one that tortured Stephen Orlando. Dougan merely killed him ... and he died an instantaneous death.... But Barclay was just as much his executioner as Dougan was.

Transcript from Tape of Oral Argument, at 18-19 (included as Appendix H to the brief).

without so expanding the reach of the circumstance that it violates the requirements of Godfrey v. Georgia and Maynard v. Cartwright.

2. Cold, calculated and premeditated

In finding that the evidence established the "cold, calculated" circumstance, Judge Olliff relied on the following facts:

> The gang, under Dougan's leadership, premeditatedly planned to kill a white person -- any white person. The victim was selected because of his vulnerability.
>
> The plan was conceived long before the actual murder (at least hours and possibly days). The defendants set out upon their task armed with a knife and gun - to be used solely to commit murder.
>
> The defendants rode around the city for hours looking for a victim, during which time Dougan wrote a note to be attached to the dead body of the ultimate victim.
>
> There was no pretense of moral or legal justification -- only blood lust and an intent to start a racial war and revolution.

R. 1101-02.

In Issue IV (B), supra, we have argued that "pretense of moral or legal justification" should be interpreted to preclude the finding of the "cold, calculated" circumstance in crimes like Mr. Dougan's. Contrary to Judge Olliff's finding that the killing was solely for "blood lust" and out of racial hatred -- a finding which is utterly devoid of record support -- the killing here was committed as the hoped-for beginning of a black people's revolution, the avowed purpose of which was to end the racist subjugation of black people. Thus, in contrast to a purely

racially-motivated killing, where hatred of the victim for no reason other than race is the motive -- as, for example, Ku Klux Klan killings usually are -- the killing here was for the purpose of advancing the freedom of black people. There is a "pretense" of moral justification for Mr. Dougan's kind of killing, since it aspires toward accomplishing a moral goal. In contrast, there is no "pretense" of moral justification in a Klan-type killing, since the goal to which it aspires -- the elimination of person of a different race, not because of their race's oppression of the killer's race, but solely because of their race -- is immoral by contemporary standards.

Judge Olliff's finding here implicitly recognized the legitimacy of the construction of this circumstance urged by Mr. Dougan. Indeed, by finding the facts in such a way as to negate any pretense of moral justification, Judge Olliff has shown how this circumstance can be appropriately and narrowly construed. Judge Olliff stands the facts on their head in order to make the finding that he does, but he nevertheless demonstrates the practicability of the construction advanced by Mr. Dougan.

If this circumstance is to be sufficiently limited as to pass muster under Godfrey and Maynard, the construction put forward by Mr. Dougan must be accepted. See Kennedy, Florida's "Cold, Calculated and Premeditated" Aggravating Circumstance in Death Penalty Cases, 17 Stetson L.Rev. 47, 101-04 (1987). Further, since the uncontroverted facts of Mr. Dougan's case do not permit the finding of this circumstance under the

construction he advances, Judge Olliff's finding of this circumstance should be set aside.

3. Murder in the course of kidnapping

Mr. Dougan also challenges the finding of this circumstance by Judge Olliff, and he relies on his argument in Issue IV (C), supra, in support of his position that the evidence does not establish that murder occurred in the course of the commission of a kidnapping.

VI. DEATH IS A DISPROPORTIONATE SENTENCE FOR MR. DOUGAN

This State has long recognized that lesser sentences imposed on accomplices may be considered as a mitigating circumstance, so long as the defendant and his accomplice have played the same or similar role in the commission of the crime. See, e.g., Rogers v. State, 511 So.2d at 535; Jackson v. State, 366 So.2d 752, 757 (Fla. 1978); Smith v. State, 365 So.2d 704, 708 (Fla. 1978); Slater v. State, 316 So.2d 539, 542 (Fla. 1975). In the crime involved in this case, Mr. Dougan and his accomplice Elwood Barclay played somewhat different roles, but both played major roles. In the 1975 trial, Mr. Dougan was described as the person "who conceived and planned the events that occurred." Barclay v. State, 343 So.2d 1266, 1271 (Fla. 1977). However, Barclay's "participation, like Dougan's, was found by the trial judge not to be minor, as he was the first to assault the victim and then stab him repeatedly." Id. For these reasons, in the first appeal to this Court, the Court equalized Dougan's and

Barclay's sentences, finding explicitly that they were "[t]wo co-perpetrators who participated equally in the crime." Id.

Subsequently, in Barclay's new appeal from the 1975 trial, the Court reversed its view on this matter, even though the State argued forcefully that Barclay participated as an equal in the actual commission of the crime and in the conduct that followed the crime. See Barclay v. State, 470 So.2d at 695 ("there was a rational basis for the jury's distinction between these co-defendants" with Dougan seen as "the leader" and Barclay as "the follower").[35]

In light of this Court's differing views on this subject, it is plain that both views are reasonable. It is for this reason that Mr. Dougan has not complained in this appeal about Judge Olliff's failure to find as a mitigating circumstance that he and Barclay played equal roles in the crime. However, the starting point for considering whether death is a disproportionate punishment for Mr. Dougan is the recognition that reasonable judges have gone both ways on the question of the relative culpability between him and Barclay.

The second point is that Barclay's death sentence has now been reduced to life. Admittedly, the Court took that action because the original sentencing jury had recommended life for Barclay and death for Dougan. Barclay v. State, 470 So.2d at 695. However, Barclay is the same person who in the same case

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[35]The State's argument that this distinction was inappropriate is set forth in Appendix H, at pp. 16-20.

this Court previously characterized as, a "co-perpetrator[] who participated equally in the crime" with Dougan. Thus, the relative culpability of Barclay and Dougan is very close. And if life is the appropriate sentence for Barclay, life must be seriously considered as the appropriate sentence for Mr. Dougan.

Even though the relative culpability of Mr. Barclay and Mr. Dougan is quite close, the most compelling reasons for now finding death to be a disproportionate punishment in Mr. Dougan's case are the mitigating circumstances that are now in evidence, which were not in evidence before. This new evidence provides the Court with a new opportunity, as well as a new reason, to examine anew the appropriateness of a death sentence for Mr. Dougan. Thus, the Court's recent observation in Fitzpatrick v. State, 527 So.2d 809 (Fla. 1988), is just as apropos here:

> We note that the record on resentencing is substantially different from that of the original sentencing. Thus, while it is true that we upheld the sentence of death on the original direct appeal, the additional live expert testimony allows us to examine the appropriateness of the sentence of death in light of the fresh record developed on resentencing.

Id. at 812. Accord, Proffitt v. State, 510 So.2d 896, 897-98 (Fla. 1987).

When the Court re-examines the appropriateness of Mr. Dougan's sentence of death in light of the new evidence, it cannot help but be struck by three areas of evidence: the quality and extent of Mr. Dougan's positive contributions to his community in the years preceding the tragic days of June, 1974 -- which are still remembered and revered by many members of that

community; the role in which many years of racial bias and oppression played in Mr. Dougan's fundamentally wrong, but morally understandable actions; and the growth in Mr. Dougan since then, coupled with the unsurpassed potential in him for making and continuing to make contributions to the community within which he lives.

When these powerful life factors are put in the balance, when the shadows of race bias are removed from Mr. Dougan's recent resentencing trial, and when Judge Olliff's misguided assessment of mitigating and aggravating factors is corrected, the Court should reach the same conclusion that it did in Fitzpatrick:

> We do not believe that this is the sort of 'unmitigated' case contemplated by this Court in Dixon [as the kind of case for which the death penalty is reserved].

527 So.2d at 812.

VII. MR. DOUGAN WAS DENIED A FAIR TRIAL DUE TO THE TRIAL COURT'S FAILURE TO CHANGE VENUE OR PROVIDE ALTERNATIVE RELIEF IN THE WAKE OF GRAVELY PREJUDICIAL PUBLICITY THE DAY BEFORE HIS TRIAL BEGAN

Mr. Dougan's trial began on Monday, September 14, 1987. On Sunday, September 13, 1987, The Florida Times Union/Jacksonville Journal, the major newspaper in Duval County,[36] ran a feature story in its "Metro/State" section about Mr. Dougan and his case. The article started on the first page of this section, and continued onto an entire page within the section. R. 1196-97.

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[36]There are 208,423 households in Duval County. R. 1192. The circulation of this edition of the newspaper is 223,676. Id.

The article was highly prejudicial, containing numerous references, beginning with the title, to Mr. Dougan having been sentenced to death before; an extensive discussion of inadmissible evidence about another homicide in which Mr. Dougan was allegedly involved; and numerous inaccurate and inflammatory references to the facts of the case. See R. 1196-97.

In light of this article, Mr. Dougan moved for a change of venue, continuance, sequestered individual voir, and additional peremptory challenges, R. 1191-94, but his motion was denied. T. 214.[37]

Mr. Dougan's motion should have been granted, because this publicity was presumptively prejudicial. Prejudice is presumed from pretrial publicity when the publicity is sufficiently prejudicial and inflammatory, and it has saturated the community where the trial was held. Rideau v. Louisiana, 373 U.S. 723, 726-27 (1963); Murphy v. Florida, 421 U.S. 794, 798-99 (1975). See also Coleman v. Kemp, 778 F.2d 1487 (11th Cir. 1985). The eve-of-trial publicity in Mr. Dougan's case met this test.

In addition, Mr. Dougan suffered actual prejudice. He did not have sufficient peremptory challenges -- and the trial court would allow no additional challenges -- to excuse two jurors who had been exposed to publicity but whom the court would not excuse for cause. See T. 604.

For these reasons, Mr. Dougan was denied a fair capital

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[37]The motion was taken under advisement, and jury selection proceeded.

sentencing proceeding, in violation of the Eighth and Fourteenth Amendments.

VIII. THE USE OF THE "COLD, CALCULATED AND PREMEDITATED" AGGRAVATING CIRCUMSTANCE VIOLATED MR. DOUGAN'S RIGHTS UNDER THE EX POST FACTO CLAUSE OF THE UNITED STATES CONSTITUTION

The "cold, calculated" aggravating circumstance became a part of Florida's death penalty statute on July 1, 1979, five years after the commission of the murder for which Mr. Dougan was resentenced in September, 1987. As we have noted, the jury was directed to consider this circumstance, and the trial judge found that it was established by the evidence.

The use of this circumstance in Mr. Dougan's trial violated his rights under the Ex Post Facto Clause. First, it was, quite obviously, applied to events occurring before its enactment. Second, Mr. Dougan was disadvantaged by it. The availability of this circumstance at the time of his resentencing trial permitted the State to secure an additional aggravating circumstance which could have tipped the weighing of aggravating and mitigating factors against him and which has made his case, for purposes of proportionality review, appear to be more aggravated than Mr. Barclay's case.

Mr. Dougan is cognizant of the Court's rejection of this argument in Combs v. State, 403 So.2d 418 (Fla. 1981), cert. denied, 456 U.S. 984 (1982), as well as its adherence to the holding in Combs since then. However, he urges the Court to

reconsider its position in light of the recent decision of a federal habeas court granting relief on this claim. See Stano v. Dugger, ___F. Supp.___ (No. 88-425-Civ-ORL-19) (May 18, 1988). See also State v. Correll, 148 Ariz. 468, 715 P.2d 721, 734 (1986).

IX. REFERENCES IN MR. DOUGAN'S RESENTENCING TRIAL TO HIS TRIAL IN 1975 COULD HAVE DIMINISHED THE SENSE OF RESPONSIBILITY FELT BY JURORS FOR THEIR SENTENCING RECOMMENDATION, IN VIOLATION OF THE EIGHTH AMENDMENT RULE OF CALDWELL V. MISSISSIPPI

From the very beginning of Mr. Dougan's trial the judge and prosecutor made references to Mr. Dougan having been tried "twelve years ago," T. 216-17, and to the "trial on February 24, 1975," T. 783-85; 1066. When the testimony of two witnesses who were unavailable was read to the jury, reference was made to reading their testimony "from the 1975 trial." T. 783-85; 1066. With these references, which were completely unnecessary, a reasonable juror could have concluded that Mr. Dougan must have been sentenced to death once already, particularly in light of the passage of time since the "1975 trial" and in light of the reading of testimony from that trial.[38]

These references created the risk that the jury might feel a diminished sense of responsibility for the sentencing recommendation in 1987, either because of the belief that death was already the appropriate sentence or that appellate review

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[38]The jury was told only that Mr. Dougan was convicted in the 1975 trial and that he was now to be sentenced. T. 216-17.

would correct any mistakes the jury might make in this proceeding, as it had before. Under either belief, Mr. Dougan would have been deprived of his Eighth Amendment right to have a sentencer who feels a full sense of responsibility for the sentence he or she recommends. See Caldwell v. Mississippi, 472 U.S. 320 (1985).

X. PROBABLE CAUSE TO ARREST MR. DOUGAN WAS BASED UPON INFORMATION OBTAINED IN VIOLATION OF HIS FIRST AMENDMENT RIGHTS, AND HE WAS ARRESTED IN HIS HOME WITHOUT A WARRANT, REQUIRING THAT ALL THE EVIDENCE OBTAINED AS THE FRUITS OF HIS ARREST BE SUPPRESSED

Mr. Dougan was arrested for and convicted of contempt of court in 1971, solely because he was involved in picketing the Duval County Courthouse. His picketing activity was fully protected by the First, Ninth, and Fourteenth Amendments, and his conviction was, for this reason, constitutionally invalid. See R. 969-1012. Nevertheless, when he was arrested, the police obtained his fingerprints.

Thereafter, in 1974, following the death of Stephen Orlando, the police undertook illegal surveillance of Mr. Dougan because of his civil rights activities, and as a result compared his unconstitutionally obtained fingerprints (from 1971) with fingerprints on packages and tapes sent to media outlets and the police in the wake of the Orlando murder. R. 568. Probable cause for Mr. Dougan's arrest was derived from this comparison. Id.

Mr. Dougan's arrest on the basis of probable cause derived

in such a fashion violated his First, Fourth, and Fourteenth Amendment rights, and all evidence obtained as a result of his arrest or fingerprint comparisons should have been suppressed. Davis v. Mississippi, 394 U.S. 721 (1969). This included the tapes and packages in which they were sent and the handwriting exemplars obtained in the consent search of his automobile pursuant to his arrest.

Further, Mr. Dougan was arrested without a warrant in a residential unit in which he was a guest with a reasonable expectation of privacy. There were no exigent circumstances associated with his arrest. Accordingly, his arrest and the consent search of his automobile pursuant to the arrest were also unconstitutional under Payton v. New York, 445 U.S. 573 (1980).

XI. THE JURY'S SENSE OF RESPONSIBILITY FOR ITS ADVISORY SENTENCE WAS DIMINISHED BY THE COURT'S FAILURE TO INSTRUCT THE JURY THAT GREAT DEFERENCE WOULD BE GIVEN TO ITS ADVISORY VERDICT

As in Adams v. Dugger, 804 F.2d 1526 (11th Cir. 1986), modified, 816 F.2d 1493 (11th Cir. 1987), cert. granted, __U.S. __, No. 87-121 (March 7, 1988), Mr. Dougan's jury was instructed that the judge was the final sentencer and that the jury's sentencing verdict was only advisory, without informing the jury that, notwithstanding this relationship, the judge had to give considerable deference to the advisory verdict. T. 699-700; 1748. Such an omission has the effect of diminishing the jury's responsibility for its verdict, in violation of Caldwell v.

Mississippi, 472 U.S. 320 (1985).

Mr. Dougan recognizes that this Court has repeatedly rejected this claim but urges the Court to withhold further adjudication of it until the Supreme Court issues its decision this Term in Adams v. Dugger.

XII. IN GIVING OVER TO THE VICTIM'S FAMILY THE DECISION WHETHER TO SEEK DEATH AGAIN IN MR. DOUGAN'S RESENTENCING TRIAL, THE PROSECUTOR ABDICATED THE PROSECUTORIAL FUNCTION DEMANDED UNDER STATE AND FEDERAL LAW

Prior to the resentencing trial, the State Attorney indicated to defense counsel that he would be willing to agree to the imposition of a life sentence, subject to the approval of Stephen Orlando's family. R. 1044. They disapproved of this proposed disposition, and the State Attorney refused any further to consider imposition of a life sentence by agreement. Id.

In allowing the victim's family to control his discretion, the prosecutor violated three safeguards established by State and federal law. First, he abdicated the responsibility placed upon him by state law, for the prosecutor's "duty is not to obtain convictions but to seek justice, and he must exercise that responsibility with the circumspection and dignity the occasion calls for." Kirk v. State, 227 So.2d 40, 43 (Fla. 4th DCA 1969). See also, Cochran v. State, 280 So.2d 42, 43 (Fla. 1st DCA 1973). Second, he allowed his discretion to be controlled by "factors [that] may be wholly unrelated to the blameworthiness of a particular defendant," creating a risk that the death sentence could be imposed on the basis of arbitrary or discriminatory

factors. Booth v. Maryland, ___U.S.___, 96 L.Ed.2d 440, 449 (1987). Finally, he invited decision-making on the basis of race bias. McCleskey v. Kemp, __U.S.__, 95 L.Ed.2d 262 (1987).

For all these reasons, the prosecutor created an unacceptable risk that Mr. Dougan would be sentenced to death on the basis of constitutionally impermissible considerations. Accordingly, his sentence should be vacated and remanded for imposition of the sentence which the prosecutor, acting in his official capacity, deemed appropriate -- a life sentence.

CONCLUSION

For the foregoing reasons, Mr. Dougan respectfully requests that the Court vacate his death sentence and impose a sentence of life imprisonment or remand for a new sentencing proceeding before a new jury.

This 14th day of October, 1988.

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that he has this day served a copy of the foregoing Appellant's Initial Brief upon counsel for the State of Florida by depositing a copy of the same in the United States mail, postage prepaid, addressed to:

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Assistant Attorney General
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This 14th day of October, 1988.

James E. Ferguson II

ATTORNEY FOR APPELLANT JACOB DOUGAN